Supreme Court, U.S.
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No. 97-

In the

Supreme Court of the United States

October Term, 1997

ZENITH/KREMER WASTE SYSTEMS, INC. AND UNITED WASTE SYSTEMS, INC.,

Petitioners,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a local governmental unit may discriminate against interstate commerce in waste disposal services through the use of a fee/subsidy scheme enacted to ensure the financial success of its disposal facility, in direct conflict with *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994), and *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994).

2. Whether the waste management fees levied by a sanitary district are general taxes that may freely be used to subsidize a local business activity, to the extent that competition from out-of-state businesses is effectively precluded, when the sanitary district is governed by appointed directors and the revenues from the waste management fees are earmarked for specific purposes and are not part of general revenues.

RULE 29 STATEMENT

PARTIES TO THE PROCEEDING

USA Waste Services, Inc., a publicly traded company, owns petitioner United Waste Systems, Inc. Zenith/Kremer Waste Systems, Inc. is a wholly owned subsidiary of United Waste Systems, Inc.

On March 11, 1998, USA Waste Services, Inc. announced its agreement to merge with Waste Management, Inc., also publicly traded. As of the date of this Petition, the merger has not been completed.

Respondent Western Lake Superior Sanitary District is a public corporation and a political subdivision of the State of Minnesota created pursuant to Minn. Stat., ch. 458D.

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Petitioners Zenith/Kremer Waste Systems, Inc. and United Waste Systems, Inc. seek a writ of certiorari from this Court to review the judgment of the Minnesota Supreme Court.

OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 572 N.W.2d 300 (Minn. 1997). (App. 1-14.) The Minnesota Court of Appeals decision, which the Minnesota Supreme Court reversed, is reported at 558 N.W.2d 288 (Minn. Ct. App. 1997). (App. 15-27.) The decision of the state district court in this case is unreported. (App. 28-55.)

JURISDICTION

The Minnesota Supreme Court filed its decision on December 24, 1997.

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a). They raised the constitutional issue presented in this Petition in the first instance in the state district court. (App. 29.) That issue was addressed by both appellate courts on the merits, with the state supreme court ultimately deciding that the local fee/subsidy scheme did not violate the Commerce Clause.

STATUTORY PROVISIONS INVOLVED

Constitutional Provision

"Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3 (Commerce Clause).

Minnesota Statutes

The relevant Minnesota Statutes are reproduced in the Appendix. (App. 92-99.)

STATEMENT OF THE CASE

Petitioner Zenith/Kremer Waste Systems, Inc. (Zenith) is the dominant waste hauler operating within the political boundaries of respondent Western Lake Superior Sanitary District (WLSSD). Zenith collects from 40 to 50 percent of the solid waste generated within the district. Zenith's corporate parent, petitioner United Waste Systems, Inc. (United), owns a landfill in Ontonagon County, Michigan.

The Minnesota Legislature established WLSSD as a public corporation and political subdivision in 1971 to address "serious problems of water pollution and disposal of sewage" in the lower basin of the St. Louis River, which drains into Lake Superior at Duluth, Minnesota. Minn. Stat. § 458D.01 and § 458D.03, subd. 1 (1996). Local units of government appoint WLSSD's board members. Minn. Stat. § 458D.03, subd. 2 (1996).

WLSSD is empowered to sell general obligation bonds and to levy property taxes. Minn Stat. § 458D.14, subd. 4 and § 458D.15 (1996). Under Minn. Stat. § 115A.554 and § 400.08, WLSSD also has the power to collect "just and reasonable rates and charges for solid waste management services ...." The charges WLSSD collects are not available for general governmental purposes and do not become part of the general revenues of the elected governmental units within the district. Minn. Stat. § 458D.17 (1996). Rather, WLSSD can only use the charges it levies on the generators of solid waste for the repayment of disposal facility debt service, the funding of recycling and waste reduction programs, and

landfill closure and clean up. Minn. Stat. § 115A.554 (Supp. 1997) and § 400.08, subds. 1 and 3 (1996).

In 1973, WLSSD began to build a sewage treatment facility to clean up the St. Louis River. The system included an incinerator to burn sewage sludge. The waste water plant opened in 1978, but the incinerator did not function reliably until 1985. (App. 61.) Federal and state grants paid most of the capital costs, but WLSSD has issued bonds to finance facility improvements. (App. 31.)

Although the incinerator was designed to burn other fuels, municipal solid waste has been the primary energy source for sewage sludge combustion. From 1985 to 1992 WLSSD relied on its enabling legislation to capture the solid waste needed to run the incinerator. (App. 62.) WLSSD adopted explicit flow control regulations in 1992 that designated the incinerator as the exclusive disposal facility for district-generated solid waste. *Id.* With that enactment, the transportation of solid waste outside the district was subject to criminal sanctions. *Id.*

In September 1995, United acquired Zenith. Shortly thereafter Zenith announced that it would begin exporting solid waste to United's Ontonagon facility unless WLSSD's disposal charges were slashed. (App. 31-32.) WLSSD's tipping fee was $63 per ton; in contrast, United's facility in the nearby Upper Peninsula of Michigan charged a tipping fee of $40 to $45 per ton. (App. 4.)

In October 1995, Zenith commenced a challenge to WLSSD's flow control regulations under the Commerce Clause. The Minnesota federal district court granted summary judgment against WLSSD. *Zenith/Kremer Waste Systems, Inc. v. Western Lake Superior Sanitary Dist.*, Civ. No. 5-95-208, Report and Recommendation, 1996 WL 612465 (July 2, 1996), *adopted* (D. Minn. Oct. 10, 1996). (App. 56-91.) The federal court found that WLSSD had pointedly discriminated against interstate commerce. "[WLSSD's] designation shares

the vice that proved fatal in *Carbone*–namely, it 'hoards' locally generated waste for the benefit of a preferred processing facility, thereby squelch[ing] competition in the waste processing service altogether, leaving no room for investment from outside." (App. 82.) The federal court also rejected "[WLSSD's] contention that 'RDF [or processed garbage] was the only steadily available and usable fuel source for incineration.'" (App. 85.) In addition, flow control was found not to be "the only means by which the synergism [of employing garbage to burn refuse sludge] can be accomplished. As a matter of pure common sense, [WLSSD] does not need flow control in order to secure a local supply of solid waste, as it need only lower its tipping fee so as to induce local haulers to dispose of their waste at [WLSSD's] facility." (App. 88.)

WLSSD never abandoned flow control. But the precedents of this Court foreshadowed the fate of its designation regulations. Consequently, while Zenith's federal action was pending, WLSSD considered three options to guarantee the supply of solid waste necessary to the financial success of its incinerator. As WLSSD's executive director explained, "our counties spent a lot of money building sophisticated ways to manage and dispose of trash. We need our garbage." (Mn. App. 568.)[1]

To ensure the financial health of the incinerator, the three options WLSSD publicly considered were: (1) impose the "full cost of all [waste management] programs on the tipping fee"; (2) reduce the tipping fee and levy ad valorem taxes to offset the lost tipping fee revenues; or (3) lower tipping fees and impose a service charge equal to the reduction. (App. 4.) Continuing to pay for the facility through tipping fees was rejected because it would "require guaranteed flow to

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[1] The abbreviation "Mn. App." refers to the appendix in the Minnesota Supreme Court, part of the record below.

implement." (Mn. App. 595.) And shifting the costs to a general ad valorem tax on real estate was deemed to be politically unpopular. (Mn. App. 594.) Accordingly, WLSSD selected option three, the fee/subsidy scheme: tipping fees were cut from $63.00 to $39.75 per ton, and each ton of waste generated in the district was assessed a $28.25 waste management charge. (App. 4, 32-33.) Because tipping fees no longer covered the cost to operate the incinerator, WLSSD subsidized the incinerator out of the revenues derived from the waste management charge. (App. 5, 32-33.)

The effect of the new scheme on out-of-state competitors was immediate. The waste management fee was imposed on all of the waste collected in the district regardless of its disposal destination. A substantial part of the waste management charge was used to subsidize WLSSD's waste disposal facility. If Zenith wanted to do business with a Wisconsin or Michigan landfill, it would still have to pay WLSSD's service fee in addition to the transportation costs and disposal charges at the out-of-state landfill. The actual costs of hauling garbage out of the district, coupled with WLSSD's artificially depressed tipping fees, rendered Ontonagon and every other out-of-state disposal facility uneconomic. Even though flow control has been struck down, the fee/subsidy arrangement has effectively blocked the importation of waste disposal services into the district. (Mn. App. 841-42.)

WLSSD's new attack on interstate commerce drew another lawsuit by Zenith and United. The state district court ruled that the fee/subsidy scheme violated the Commerce Clause. The lower court found that "[i]n all likelihood, the purpose for the adoption of the fee system was to discriminate in a financial sense against interstate commerce as a mechanism to assure to the WLSSD plant a solid waste stream it desires for energy purposes." (App. 40.) Therefore, "WLSSD chose to accomplish indirectly what it [sic] had

become ever more clear it would not accomplish directly by outright designation." (App. 41.) Besides a discriminatory purpose, the district court found a discriminatory effect. The fee/subsidy scheme was held to be similar in design and effect to the milk subsidy arrangement struck down in *West Lynn Creamery v. Healy*, 512 U.S. 186 (1994).

The Minnesota Court of Appeals affirmed, but rested its holding on the discriminatory effects of the fee/subsidy scheme. A minimum of $7 of the $28.75 waste management charge–about 25 percent of the fee–was used to pay debt service. To that extent, at least, part of the charge was imposed only "on haulers to out-of-state landfills."[2] (App. 20.) Relying on *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), the court of appeals found the WLSSD fee/subsidy to be an unconstitutional financing measure. As in *Carbone*, there were non-discriminatory means available to WLSSD to finance its waste management services.[3] (App. 23.)

The Minnesota Supreme Court accepted discretionary review and reversed. The court characterized the waste service fee as a general tax (App. 8.), even though WLSSD is a special purpose, unelected governmental unit and the revenues are earmarked for a particular purpose. The application of the tax to all residents of the district was found

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[2] Seven dollars is the uncontested amount of the waste management fees that is used as a subsidy. In fact, the burden on interstate commerce is much higher. The 1996 budget revealed that WLSSD had shifted the funding source for the costs of administration, quality control and engineering from tipping fee revenues to the waste management fee. These costs are plainly associated with waste disposal and amounted to $10.70 per ton. Thus, over 60 percent of the waste management fees underwrite incinerator operations. (Mn. App. 636, 726.)

[3] Less than one month later, the Minnesota Court of Appeals invalidated a similar fee/subsidy scheme. *Sanifill, Inc. v. Kandiyohi County*, 559 N.W.2d 111 (Minn. Ct. App. 1997).

to make the service fees non-discriminatory and locally focused. (App. 10.) The court saw *West Lynn* as inapposite because the tax was levied on WLSSD residents, not on interstate haulers, and because the fees were used to support a governmentally owned facility. (App. 9.) This Court's precedents were interpreted to "suggest" that subsidies are constitutional means of supporting local interests. (App. 6.) Expanding on that suggestion, the court framed the key issue as whether the service fees were a permissible source of the subsidy. *Id.* The court discounted the impact of the fee/subsidy scheme on the out-of-state disposal market as incidental. (App. 14.) Recognizing, but ignoring, the economic protectionism inherent in the fee/subsidy scheme, the Minnesota Supreme Court held that the tax was properly adopted to ensure the financial security of the incinerator. (App. 13.)

The court went on to explain that "[t]he fact that the total amount of revenue garnered from the new tax system is almost identical to the amount obtained under the single fee simply underscores WLSSD's purpose in obtaining necessary revenue for the facility, rather than a desire to discriminate against interstate commerce." (App. 12.) Because no discriminatory effect or purpose was found, the court applied the *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), balancing test. While the court recognized that the fee/subsidy scheme diverted business from and "more heavily affected" interstate commerce, the burden on interstate commerce was "not clearly excessive" in light of the environmental benefits and financial security provided. (App. 13.)

As a concluding note, the state supreme court commended WLSSD and encouraged other governmental units to follow the WLSSD "model." (App. 14.) With this endorsement, the fee/subsidy method of insulating the local waste disposal marketplace is certain to spread within Minnesota and beyond. Governmental units whose waste

disposal facilities are subject to competition from lower cost out-of-state providers as a result of *Carbone* have been provided a new chart to a safe harbor.[4]

REASONS FOR GRANTING THE WRIT

This case raises an important question left unresolved by prior decisions of this Court: what are the limits that the dormant Commerce Clause imposes on governmental efforts to subsidize a local activity when such efforts have a discriminatory effect on interstate commerce. In a series of decisions over the last several years, the Court has delineated the contours of the authority that states and their political subdivisions have to support local businesses through regulations, taxes and subsidies. Only last term, the Court ruled that a state could not impose greater taxes on its residents as a penalty for doing too much business with out-of-state individuals. *Camps Newfound/Owatonna, Inc. v. Town of Healy*, ___ U.S. ___, 117 S. Ct. 1590 (1997).

While the Court has suggested that certain types of subsidies to promote local business are proper, the Court has yet to provide a systematic explanation of when and how subsidies are permitted under the Commerce Clause or whether there are exceptions to such a general rule. Walter Hellerstein and Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 CORNELL L.

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[4] The court remanded the case back to the district court to resolve an issue of state law, whether the waste service charge was unreasonable under Minn. Stat. § 400.08. On the constitutional issue petitioners raise here, the decision below is truly final, for any further proceedings in the state district court will not involve the Commerce Clause or, in particular, the questions presented in this Petition. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988); Robert L. Stern, et al., SUPREME COURT PRACTICE 102-03 (7th ed. 1993).

REV. 789, 843-44 (1996). The question of subsidies that the Court expressly reserved in *Camps Newfound/Owatonna* is directly presented in this case and should be addressed. 117 S. Ct. at 1605; *see also West Lynn*, 512 U.S. at 199 n.15 ("We have never squarely confronted the constitutionality of subsidies ...."). As states and cities go to ever greater lengths to attract, promote and protect local business, resolution of the issue is more than timely.

Further, WLSSD's actions conflict with this Court's Commerce Clause precedent. The decisions in *West Lynn Creamery* and *Carbone* dictate a different result than the one reached below. In *West Lynn* this Court struck down the barriers to interstate commerce erected by a fee/subsidy arrangement that neutralized the advantage possessed by lower cost out-of-state milk producers. 512 U.S. at 194-96. For the very same industry involved here, *Carbone* precluded local restrictions against the importation of waste disposal services. 511 U.S. at 394-95. In approving the opposite result, the decision below also conflicts squarely with the decision reached in *Connecticut Carting Co. v. Town of East Lyme*, 946 F. Supp. 152 (D. Conn. 1995). Left unchanged, the Minnesota precedent will greatly undercut the freeing effect that *Carbone* had on interstate commerce in disposal services. The fee/subsidy scheme is easy to replicate, and the court below heralded the WLSSD "model" to other governmental units. (App. 14.)

The Minnesota Supreme Court rationalized the economic arrangement WLSSD employed as a constitutionally permissible subsidy out of general tax revenues. *Id.* at 304. But this characterization of the service fees as general taxation is mistaken. In *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994), the Court described general taxation "as 'tax payments [that] are received for the general purposes of the [government] and are, upon proper receipt, lost in the general revenues.'" *Id.* at 104 (quoting *Flast v.*

Cohen, 392 U.S. 83, 128 (1968) (Harlan J., dissenting)). WLSSD's earmarked service fees are certainly not general tax payments received for the general purposes of government, nor are those fees lost into general revenues upon receipt. The funds WLSSD collects are not subject to competition among many interests seeking money for their programs. Consequently, the checks and balances present in the usual political process for appropriating funds does not function here to prevent abuse. Rather, the fee revenues are being used to give advantage to WLSSD's locally favored disposal facility over the imported competition.

Not surprisingly, the Commerce Clause questions presented by this dispute arise in the context of an undeniably important issue–the handling and disposal of solid waste. The last three decades have witnessed a concerted national effort to address the problems associated with the large volumes of solid waste generated in this country. State and local governments have embarked on many schemes to conserve landfill space or to finance alternative disposal methods. The market for waste or, more precisely, the market for waste disposal services, is national in scope. Consequently, parochial attempts to control solid waste management have frequently run afoul of the Commerce Clause.

For instance, several rulings of this Court have struck down discriminatory local regulations, fees and taxes that interfered with interstate commerce in waste disposal:

- Flow control ordinances mandating disposal at a local facility.

  C & A Carbone, Inc. v. Town of Clarkstown
  511 U.S. 383 (1994)

- Additional taxes on the disposal of out-of-state waste that were not imposed on in-state waste.

  Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality
  511 U.S. 93 (1994)

- A prohibition on disposal of waste generated outside of the county unless permitted by county waste management plan.

  Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources
  504 U.S. 353 (1992)

- Fees imposed on out-of-state waste where none were imposed on in-state waste.

  Chemical Waste Management, Inc. v. Hunt
  504 U.S. 334 (1992)

- Outright ban on the in-state disposal of out-of-state waste.

  Philadelphia v. New Jersey
  437 U.S. 617 (1978)

When the constitutional trumpets began to blow against the walls that had been erected around the local waste market, WLSSD replaced regulatory designation with an economic flow control. The fee/subsidy scheme effects by economic means what the Commerce Clause prevents WLSSD from doing by fiat. The power to tax is the power to destroy, and WLSSD's waste management fees have effectively obliterated the interstate waste disposal market within the district. The

fee/subsidy scheme has the same affect on the waste disposal market as the flow control regime invalidated in *Carbone*. "[A]ctions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *Carbone*, 511 U.S. at 389. The reduction of tipping fees, when coupled with the subsidy of WLSSD's facility, have exactly that impact.

I. The decision below is in direct conflict with *West Lynn*.

There is no meaningful way to distinguish this case from *West Lynn*. In *West Lynn*, the Court faced a tax/subsidy scheme that is functionally identical to WLSSD's. To offset the out-of-state threat to Massachusetts' dairy industry, a fee was imposed on all milk sold within the state, but the revenues were distributed only to in-state dairy farmers. 512 U.S. at 190-91. The effect of the tax was to make out-of-state milk more expensive because, while local milk was also taxed, the subsidy offset the effect of the tax on Massachusetts farmers. *Id.* at 194. Like the Minnesota court in this case, the Massachusetts high court found that local benefits outweighed any incidental burden on interstate commerce. *Id.* at 191-92.

This Court reversed. The fee and subsidy were found to work in tandem to enable higher cost in-state milk producers to compete with lower cost producers from other states. *Id.* Even though the price of imported milk could be lowered, the fee/subsidy scheme was still unconstitutional because it offset the competitive advantage that out-of-state producers enjoyed. *Id.* at 195-96. Moreover, payment of the tax by in-state businesses and consumers did not save the subsidy scheme. A tax that interferes with interstate commerce is unconstitutional, even if the cost of the burden is borne primarily by the local community. *Id.* at 203. The imposition of a differential burden on any part of the stream of commerce

is invalid, *id.* at 202, because the purpose and effect of such impediments to commerce are to divert market share to local businesses. *Id.* at 203.

The Massachusetts fee/subsidy program could not avoid Commerce Clause scrutiny simply because each component standing alone would be constitutional. *Id.* at 198-99. Rather, the constitutional inquiry must focus on the program as a whole. *Id.* at 190-91. The subsidies paid to local farmers came from a revenue source enacted and dedicated for that purpose. Therefore, the arrangement was not a simple subsidy funded out of general revenues. Moreover, the method for funding the subsidy not only assisted the locally favored business; the fees burdened interstate commerce. *Id.* at 199. Finally, ensuring the financial survival of an important local industry was rejected as a justification for making the price of out-of-state articles of commerce more expensive. *Id.* at 206-07.

As in *West Lynn*, the WLSSD fee and subsidy working together unconstitutionally interfere with interstate commerce. As in *West Lynn*, the WLSSD fee is also nominally imposed only on in-state interests. But the use of the fee to benefit exclusively an in-state waste disposal service impermissibly burdens interstate commerce. A generator within WLSSD boundaries who wanted to do business with out-of-state competitors would effectively have to pay twice: once for the WLSSD service charge (to the extent of the subsidy, the equivalent of a tipping fee), and again to dispose the waste at the out-of-state landfill. Only those generators whose waste is delivered to WLSSD benefit from the subsidy because only waste burned in the incinerator has its disposal charges reduced by the service fee rebates that WLSSD pays to itself. Thus, out-of-state waste disposal services are taxed more heavily simply because they cross the district's boundaries. The effect of this fee/subsidy combination is to make imported waste disposal services more expensive and to provide

WLSSD with a competitive advantage. Such burdens on interstate commerce are "generally forbidden." *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 342 (1992); *see Connecticut Carting*, 946 F. Supp. at 155 (invalidating similar scheme because of similar discriminatory effect); *accord Mid-American Waste Systems, Inc. v. Fisher*, No. C-2-94-493, Slip Op. at 9 (S.D. Ohio. May 31, 1994)(enjoining similar fee/subsidy of Solid Waste Authority of Central Ohio).

The only difference between the milk fee/subsidy scheme in *West Lynn* and the waste fee/subsidy in this case is that WLSSD succeeded at shutting out interstate competition. Because WLSSD's subsidy is large enough to make out-of-state disposal uneconomic, WLSSD's scheme has created a barrier to interstate commerce. With respect to solid waste, WLSSD has achieved exactly what the Commerce Clause prohibits–the isolation of a state "from a problem common to the several States by raising barriers to the free flow of interstate trade." *Id.* at 339-40.

WLSSD has regulatory authority over all solid waste management within district boundaries. At the same time, WLSSD's incinerator directly competes in the interstate waste disposal market. By using its power to assess fees, WLSSD is able to achieve economic ends that it cannot win in open interstate competition. The provision of local subsidies from fees that are imposed upon a particular industry that had the effect of making imported products more expensive is exactly the arrangement that *West Lynn* condemned. This Court observed, "this effect [of favoring local services] renders the program unconstitutional, because it, like a tariff, 'neutralize[s] advantages belonging to the place of origin.'" 512 U.S. at 196 (quoting *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935)). WLSSD's fee/subsidy scheme is no different. The charges upon waste generation are not a general tax levy, and the revenues are being used to erect barriers to interstate trade.

II. The decision below upheld an economic flow control scheme that conflicts with *Carbone*.

In *Carbone*, the Court considered the constitutionality of a financing measure that was designed to ensure the long term survival of a municipal solid waste transfer station. 511 U.S. at 394. To amortize the cost of the facility, the town guaranteed the operator a minimum supply of waste at a specified tipping fee. To meet its obligation the town designated the transfer station as the sole disposal destination for all of the town's waste.

This Court struck down flow control, rejecting the financial justification asserted by the town. Even though only locally generated waste was directed to the facility, the impact on interstate commerce was obvious. Flow control drove up the price of disposal and denied out-of-state businesses access to the local waste processing market. *Id.* at 389.

The key to the Court's analysis in *Carbone* was the recognition that the affected article of commerce is the service of disposing and processing waste. *Id.* at 391. As a result of the *Carbone* decision, all local markets were opened to operators of properly designed and sited landfills. This result, along with improved waste disposal practices and federally established uniform landfill requirements, *see* 42 U.S.C. § 6944 (1994); 40 C.F.R. parts 257 and 258 (1997), helped create a regional, as opposed to merely local, market for waste disposal services.

The decision below undoes what *Carbone* accomplished. Like the municipality in *Carbone*, WLSSD directed all waste to its incinerator. With the imminent demise of flow control, WLSSD substituted waste management charges as the means for capturing the waste. The court below and WLSSD readily acknowledge that the fee/subsidy scheme is being used to obtain the necessary revenues for the incinerator "to ensure the financial survival of the waste facility ...." (App. 11.) The

fact that the waste charges are only assessed within the district does not save it from the analysis applied in *Carbone*. This Court noted that "[t]he ordinance is no less discriminatory because in-state or in-town processors are also covered ...." 511 U.S. at 391.

More important, like the arrangement in *Carbone*, WLSSD's fee/subsidy scheme simply closes off the local market. United is prevented from competing for the disposal of waste from the district. As it did under flow control, WLSSD "hoards solid waste and the demand to get rid of it." *Id.* at 392. By favoring a single local facility, the fee/subsidy scheme makes the protectionist effect more acute. *Id.* The imposition of additional costs through discriminatory tax treatment places out-of-state goods and services at a commercial disadvantage, a result the Commerce Clause will not tolerate. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 275 (1988).

The WLSSD action is especially pernicious because of its undisguised discriminatory purpose. The trial court found that the fee/subsidy scheme was enacted to replace the obviously unconstitutional flow control requirement. WLSSD covets solid waste for its incinerator, though other fuels would work. And to get what it wants, WLSSD has used its authority to levy a fee large enough to freeze out interstate competition. This overt financial justification was rejected in *Carbone* and should be rejected here.

III. The decision below cleanly and squarely presents two important questions which this Court should decide: what is a general revenue tax for Commerce Clause purposes and how far can a local unit of government go in subsidizing local business.

One of the singular accomplishments of the Constitution was the forging of a national market that transcended local

interests. "If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring). Indeed, the negative, or dormant, aspect of the Commerce Clause may be the most important aspect of the clause. *West Lynn*, 512 U.S. at 193 n.9 (citing James Madison's comments). The prohibition of discrimination against out-of-state businesses prevents the "'economic Balkanization'" of the nation's economy and markets. *Camps Newfound/Owatonna*, 117 S. Ct. at 1599 (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)). In this case, yet another local unit of government has made a frontal attack on this objective.

The critical significance and broad application of the Commerce Clause to preclude local trade barriers was emphasized again during this Court's last term. *See Camps Newfound/Owatonna*, 117 S. Ct. at 1595-96. In *Camps Newfound/Owatonna*, this Court held that a state could not tax its residents more heavily simply because they did a certain level of business with persons from other states. 117 S. Ct. at 1596. The issue left open is squarely presented here: can a state or one of its political subdivisions levy a tax and use the tax revenues to insulate local business from out-of-state competition. The answer should be absolutely not.

As emphasized in *West Lynn*, the Commerce Clause is intended to ensure that state markets remain open to out-of-state providers of goods and services who possess a competitive advantage. That the WLSSD tax is local in focus, purpose and reach does not remove it from Commerce Clause scrutiny, as the Minnesota court posited. (App. 10.) Rather, when the economic incidence of a taxing scheme falls upon interstate market participants, the Commerce Clause is directly invoked. *Camps Newfound/Owatonna*, 117 S. Ct. at 1600. "Even when business activities are purely local, if it is

interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Id.* at 1597 (quoting *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964)); *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)(economic substance, not form, controls in dormant Commerce Clause cases). A tax is discriminatory if it increases prices so that out-of-state market participants are deterred from doing business locally. *Camps Newfound/Owatonna*, 117 S. Ct. at 1601. And any type of tax can impermissibly burden interstate commerce. *Id.* at 1597. The WLSSD tax is plainly such a burden.

For good reason, the Minnesota Supreme Court did not rely on the market participation exception to the Commerce Clause. That exception is clearly inapplicable to the WLSSD fee/subsidy scheme. The market participant exception permits states or their political subdivisions that are participating in the market at issue to favor local businesses or residents in that market. *See White v. Massachusetts Council of Constr. Employees*, 460 U.S. 204 (1983) (City of Boston held to be market participant). Through the operation of its incinerator, WLSSD might be held to participate in the disposal market. WLSSD does not, and by state law cannot, participate in the collection or hauling markets. (App. 60.)

Furthermore, in enacting the fee/subsidy scheme WLSSD invoked its regulatory powers to fund its incinerator operations out of a tax on a specific activity, the generation of solid waste. Through imposition of a tax–the waste management charge–WLSSD has regulatory control over all solid waste generated within its boundaries. WLSSD is not merely acting as a market participant; instead it is using its taxing powers to distort the market and force "a regulatory effect in the [hauling] market, in which it is not a participant." *South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 98 (1984); *cf. White*, 460 U.S. at 211 (limits exist on local government's authority to impose restrictions beyond those

who directly transact business with governmental unit.) The tax/subsidy scheme accomplished exactly what this Court rejected in *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). WLSSD has used "its power to tax an in-state operation as a means of requiring [other] business operations to be performed in the home state." That was the purpose of WLSSD's fee/subsidy scheme. Legal flow control was unconstitutional, but WLSSD still needed its "garbage." (Mn. App. 568.)

It is hardly coincidental that several recent Commerce Clause cases have involved waste. The management of waste and its safe disposal are undeniably issues of national significance. The limits the Commerce Clause places on state and municipal authority to restrain interstate waste commerce are of critical importance to resolving the environmental and political issues presented by the disposal of solid waste. Cases construing the Court's decisions in this area are legion.[5]

If it is allowed to stand, the fee/subsidy scheme will be widely adopted, as the court below advocated.[6] Through such

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[5] For example, over 50 cases cite *Carbone* while addressing the regulation of solid waste disposal.

[6] There is evidence that states or their political subdivisions around the country are in the process of adopting schemes similar to WLSSD's. After New Jersey's flow control law was struck down, *see Atlantic Coast Demolition & Recycling, Inc. v. Board of Chosen Freeholders of Atlantic County*, 112 F.3d 652 (3d. Cir.), *cert. denied sub. nom. Essex County Util. Auth. v. Atlantic Coast Demolition & Recycling, Inc.*, __ U.S. __, 118 S. Ct. 412 (1997), various counties in New Jersey are attempting to tax waste exported out of the county to subsidize their disposal facilities. *See* Tom Hayden, *Middlesex County cleared to levy 'export' fee*, STAR LEDGER (Newark) Feb. 3, 1998, *available in* 1998 WL 3388845; Tom Avril, *Solution Sought for Counties' Trash Debts...*, PHILADELPHIA INQUIRER Feb. 4, 1998, at B1, *available in* WESTLAW, NEWSPAPERS LIBRARY, PHILINQ database. Similarly, after the flow control regulations of metropolitan Nashville were struck down in *Waste Management Inc. of Tennessee v. Metropolitan Government of Nashville and Davidson*

an arrangement, the finances of municipal facilities might be secured, but interstate commerce will be injured. Before that result attains, two issues inherent in the reasoning of the Minnesota Supreme Court should be addressed.

The first is what constitutes a general tax or general revenues for purposes of a permissible subsidy. The Minnesota Supreme Court justified the result it reached by likening the solid waste generation fee to a general revenue tax and pointing to dicta from this Court suggesting that subsidies from general revenues are permissible. The Minnesota court's characterization of the fee as a general revenue tax, however, is nothing more than a semantic sleight of hand.

The precedents the Minnesota court cited to support its conclusion are hardly apposite. One case, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981), involved a challenge to a Montana severance tax on coal. Half the revenues went into the general fund; the balance was credited to a special trust fund that required a super-majority of the legislature to appropriate. *Id.* at 613. The circumstances of *Commonwealth Edison* differ completely in terms of who enacted the tax and where the funds went. Here a special purpose, unelected political subdivision levied a charge, while the revenues are restricted to specific purposes. In contrast, the state legislature in *Commonwealth Edison* had full control over how the severance tax proceeds were spent. *See id.*

The other case the Minnesota court relied upon involved the question of whether a recycling service charge enacted by a county board of commissioners constituted a taking. *Individuals for Responsible Government, Inc. v. Washoe*

County, 130 F.3d 731 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3523 (U.S. Feb. 2, 1998)(No. 97-1259), the municipal government cut its tipping fees and, to subsidize its incinerator, proposed an $8.00 per ton charge "[t]o make up for revenue lost from the cut in fees...." Rob Moritz, *Metro aims to boost Thermal by lower fees*, NASHVILLE BANNER, Feb. 4, 1998, at A5, *available in* 1998 WL 7173271.

County, 110 F.3d 699, 704 (9th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 411 (1997). While the Ninth Circuit called the charge "essentially equivalent to a general property tax," the court analyzed the charge to determine whether there was a taking if the resident did not want the service. The concerns underpinning the Commerce Clause were far removed from the *Washoe County* analysis. The court never addressed the political restraints on the use of such funds, which was a central concern in *West Lynn*.

The reasons for this Court's deference to subsidies from general revenues simply do not apply in this case. A primary purpose of the dormant Commerce Clause is to ensure a unified national market in which goods are produced where such production is most efficient and inexpensive. *West Lynn*, 512 U.S. at 194. Plainly, if a subsidy is needed to operate the WLSSD incinerator, then the market is saying that this activity is not a good use of social resources. *See* Daniel J. Gifford, *Federalism, Efficiency, The Commerce Clause, and The Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1236 (1995). Nor is it a politically acceptable use of resources. The WLSSD recognized as much when it rejected a scheme to subsidize the incinerator out of direct property tax revenues, realizing that such taxes were politically unpopular. (Mn. App. 594.)

That does not mean that the provision of subsidies necessarily runs afoul of the Commerce Clause. This Court acknowledged in *West Lynn* that "non-discriminatory measures, like the even handed tax at issue here, are generally upheld, in spite of any adverse effects on interstate commerce, in part because '[t]he existence of major in-state interests adversely affected ... is a powerful safeguard against legislative abuse.'" 512 U.S. 200 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981)).

The fees that WLSSD levies are almost certainly not what the Court meant in the dicta about subsidies to assist local

businesses. Here, the usual political checks and balances are missing. The waste management charges are imposed by a special purpose entity whose governing body is appointed, not elected, and thus not directly responsible to the electorate. Minn. Stat. § 458D.03, subd. 2 (1996). Moreover, the revenues raised from the service charge must be used for specific purposes and are not part of the general fisc, subject to the usual competitive demands for appropriation of public funds.

The circumstances regarding the assessment of waste management fees and the use of waste service fees also ensure that there is no constituency to wage a battle against the WLSSD fee/subsidy scheme. There are no significant local interests that can hold WLSSD accountable for its use of the fees and prevent misuse of social resources. Local unaffiliated haulers will go where tipping fees are lowest, and out-of-state waste disposal facilities have no voice in the process. The absence of such political safeguards further precludes the waste management fee from being a general tax, as the Court used that term in *Carbone* and *West Lynn*.

Second, the Minnesota decision presents squarely the issue of what local units of government can do to assist or protect local businesses from interstate competition. Plainly, construction of streets, other infrastructure, good schools and the like are the run of the mine local assistance that the Commerce Clause does not prohibit. These activities do not in substance compete with interstate commerce; rather, they promote such trade. But the WLSSD scheme goes much further–the tax/subsidy combination, as in *West Lynn*, completely offsets the competitive disadvantage that the local incinerator would otherwise suffer in the interstate market place. Here the subsidy is so extreme that it closes off the market to competition from all other sources. As such, the WLSSD tax/subsidy scheme is distinct from the charges at issue in *Washoe County* and *Commonwealth Edison*, which

did not encourage affected taxpayers to limit their patronage of out-of-state businesses or penalize interstate commerce.

With its tax/subsidy scheme, WLSSD has accomplished the very market distortions that the Commerce Clause was intended to prevent. In *Camps Newfound/Owatonna*, this Court held that a state could not tax in-state residents more heavily simply because they did business with entities that came principally from other states. 117 S. Ct. at 1596. Likewise, states or their political subdivisions should not be able to tax a single activity, here garbage generation, and then rebate those revenues to a related local activity in order to insulate the home town facility from out-of-state competition. *See* Note, *Functional Analysis, Subsidies, and the Dormant Commerce Clause*, 110 HARV. L. REV. 1537, 1544 (1997).

CONCLUSION

Petitioners urge that the Court grant the writ. The decision below conflicts directly with the decisions in *West Lynn* and *Carbone* and raises the subsidy issue expressly left open last term in *Camps Newfound/Owatonna*. *See* Supreme Court Rule 10(c).

Dated: March 23, 1998

Respectfully submitted,

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STATE OF MINNESOTA
IN SUPREME COURT
C0-96-1602

Court of Appeals — Keith, C.J.

Zenith/Kremer Waste Systems, Inc., et. al.,

Respondents,

vs.

Western Lake Superior Sanitary District,
petitioner,

Appellant.

Filed: December 24, 1997
Office of Appellate Courts

SYLLABUS

1. A municipality's institution of a waste management tax and its use of the tax to subsidize the debt service on its solid waste processing facility and to lower the facility's tipping fee do not discriminate against interstate commerce.

2. The benefit to the community from WLSSD's waste management tax scheme far outweighs any incidental burden on interstate commerce.

Reversed and remanded.

Heard, considered and decided by the court en banc.

OPINION

KEITH, Chief Justice.

This case involves a Dormant Commerce Clause challenge to a municipality's use of a tax and subsidy arrangement to pay the debt service on its solid waste processing facility and to lower the facility's tipping fees. In the district court, the respondents, Zenith/Kremer Waste Systems, Inc. (Zenith/Kremer) and United Waste Systems, Inc. (United), challenged both the authority of the appellant, Western Lake Superior Sanitary District (WLSSD), to charge a waste management tax and the constitutionality of the tax. The district court granted appellant partial summary judgment on the issue of its statutory authority to charge a reasonable waste management tax and partial summary judgment to the respondents on their Dormant Commerce Clause challenge, finding that the tax and subsidy scheme has a discriminatory effect on interstate commerce. The court then ordered that waste management taxes collected by the respondents be held in a segregated account pending disposition in a separate, federal case involving the parties. The court of appeals affirmed the district court's finding of discriminatory effect, *Zenith/Kremer Waste Systems, Inc. v. Western Lake Superior Sanitary District*, 558 N.W.2d 288, 294 (Minn. App. 1997), and we granted WLSSD's petition for further review.[1]

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[1] The State of Minnesota, by its Attorney General and by the Acting Director of its Office of Environmental Assistance (OEA), moved this court to serve and file a brief as amicus curiae and was granted permission. Respondents have moved to strike that portion of the brief containing the affidavit of Arthur E. Dunn, Acting Director of the OEA, and any references to the affidavit within the briefs. Respondents assert that the affidavit constitutes information outside the record on appeal. Because the challenged affidavit and references to it in the briefs were not considered on appeal, we need not address or decide the motion.

Because we conclude that WLSSD's tax and subsidy arrangement does not impose any differential burden on out-of-state commerce and does not have a discriminatory purpose, we hold that it does not discriminate against interstate commerce. Rather, we hold that it imposes only a minor, incidental burden on interstate commerce which is far outweighed by the benefits to the municipality. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

I.

WLSSD is a limited purpose political subdivision with responsibility for regulating the collection, treatment, and disposal of sewage and solid waste within a 500-square mile territory in northeastern Minnesota. WLSSD owns and operates a waste processing facility near Duluth, Minnesota which utilizes solid waste as fuel to incinerate the sludge by-product of waste-water processing. Until March 1996, WLSSD charged a single tipping fee at the facility to cover the cost of running and financing the facility, as well as the cost of a variety of hazardous waste and recycling programs. To ensure a steady stream of solid waste for the facility, WLSSD adopted a waste designation ordinance requiring all persons who generate solid waste in the district to dispose of it at the facility. The respondents challenged this regulation and the federal district court found it to be unconstitutional. *Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.*, No. 5-95-228, 1996 WL 612465 (D. Minn. Oct. 10, 1996).

Respondent Zenith/Kremer collects, hauls, and deposits 40-50% of the solid waste generated within the district. Respondent United, which purchased Zenith/Kremer in September 1995, performs waste collection and hauling

services and owns a landfill in Ontonagon County, Michigan. In the fall of 1995, respondents informed WLSSD that they would begin disposing of the district waste collected by Zenith at the Ontonagon landfill unless WLSSD reduced its tipping fee at its facility. At that time, WLSSD charged a tipping fee of $63 per ton. The fee at the Ontonagon landfill was approximately $40-45 per ton.[2]

Following commencement of the lawsuit challenging its waste designation ordinance, WLSSD began considering alternative means of financing its solid waste services and, in November 1995, published the following options: 1) impose the full cost of all waste management programs on the tipping fee; 2) reduce its tipping fee to $55-60 per ton and add a "small ad valorem levy" to make up the lost revenues; or 3) reduce the tipping fee to $39.75 per ton and impose a service charge to make up for the lost revenues. Under Minn. Stat. § 400.08, subd. 2 (1996), the WLSSD is authorized to finance solid waste management services through service charges, a tax on all property within its jurisdiction, or a combination of charges and taxes.[3] Minnesota Statutes § 400.08, subd. 3 specifically permits WLSSD to include in the charges the payment of principal and interest on monies borrowed by the county for the acquisition or betterment of facilities.

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[2] There is some dispute over the tipping fee at Ontonagon landfill. In a letter dated October 25, 1995, Zenith/Kremer informed its customers that it had located a landfill charging a tipping fee of $30 per ton. It is disputed whether this landfill was, in fact, Ontonagon. However, this dispute is not material to a determination of whether WLSSD's waste management tax scheme is discriminatory.

[3] Minnesota Statutes § 400.08, which refers to the authority of counties, is made applicable to the WLSSD under Minn. Stat. § 115A.554 (1996).

After public hearings, WLSSD adopted a reduced tipping fee of $39.75 and a waste management tax of $28.25 per ton, effective March 1, 1996. The waste management tax is assessed on all property owners, lessees, and occupants within the waste district (waste generators) based on the amount of solid waste they generate. The amount of solid waste is calculated according to the volume of the waste generator's waste container. The management tax is collected from the waste generators by the trash haulers and remitted to WLSSD, minus a 4% administrative fee for the haulers.

At least 25% of the solid waste management tax, or $7 per ton, subsidizes the debt service and expenses of the waste processing facility resulting from improvements to the facility. Zenith/Kremer and United claim that the true amount of the subsidy is over 62% of the tax. The remainder of the tax finances WLSSD's household hazardous waste program and facility, yard composting facility, waste education programs, mercury pollution reduction program, Community Cleanup Days, improvements and closure costs of Rice Lake landfill, and other recycling activities.

II.

Article I, section 8, clause 3 of the United States Constitution, which invests Congress with the power "[t]o regulate Commerce among the several States," has long been understood to contain a self-enacting 'dormant' aspect that limits the power of states to discriminate against or burden the flow of interstate commerce. *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Oregon*, 511 U.S. 93, 98 (1994). The first step of a Dormant Commerce Clause analysis is to determine whether the law discriminates against interstate commerce or whether it regulates evenhandedly, with only incidental effects on interstate commerce. *Id.* at 99.

Discrimination under the Dormant Commerce Clause means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id.* The discrimination may be explicit on the face of the law or contained within the law's effect or purpose. *See Maine v. Taylor*, 477 U.S. 131, 138 (1986); *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 350-3 (1977). In analyzing discrimination in waste management cases, the article of commerce to be examined "is not so much the solid waste itself, but rather the service of processing and disposing of it." *C & A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 391 (1994).

The lower courts found that WLSSD's tax scheme is discriminatory because it allows the WLSSD facility to win business away from out-of-state waste processors with its subsidized tipping fee. However, any subsidy will necessarily confer an economic advantage on the industry being subsidized and a long line of Supreme Court cases, most recently *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, No. 94-1988, 1997 WL 255351, *13, *10 n.16 (U.S. May 19, 1997), have suggested that subsidies are a constitutional means of supporting state interests. The Supreme Court explained in *New Energy Co. of Indiana v. Limbach*, that a subsidy may be "no less discriminatory" than a tax credit, but "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce." 486 U.S. 269, 278 (1988).

A key point of contention is the permissible source of the subsidy. In *C & A Carbone, Inc.*, 511 U.S. at 394, the Court suggested that the town could subsidize a privately-owned trash facility "through general taxes or municipal bonds" as an

alternative to discriminatory waste designation laws. WLSSD asserts that its management tax is a "general tax" approved by *Carbone*. It relies on the interpretation of the Second Circuit Court of Appeals in *USA Recycling v. Town of Babylon*, 66 F.3d 1272, 1285 & n. 12 (2d Cir. 1995), *cert. denied*, 116 S Ct. 1419 (1996), that general taxes are non-discriminatory taxes which are applied evenhandedly to in-state and out-of-state businesses. WLSSD argues that its management tax is applied evenhandedly to all waste generators in the district, irrespective of the nature of the generator's business. Furthermore, WLSSD posits that the tax is the equivalent of a general tax because it is used to fund a range of competing, non-protectionist purposes: the household hazardous waste program, yard waste composting, waste education, mercury pollution reduction, Community Clean-up Days, environmental improvements at the local landfill, and recycling.

Respondents Zenith/Kremer and United oppose this characterization of the waste generation tax. They rely on *West Lynn Creamery Inc. v. Healy*, 512 U.S. 186 (1994) for the proposition that the source of the subsidy must be the general revenue, rather than a segregated fund, because, "A State is less likely to maintain a subsidy when its citizens perceive that the money (in the general fund) is available for any number of competing, non-protectionist, purposes." *West Lynn*, 512 U.S. at 211-12 (Scalia, J. concurring) Respondents point to Minn. Stat. § 400.08, subd. 2, limiting the use of the tax to "solid waste management services," to show that the tax is not available for competing purposes and therefore, is not a general revenue tax. In addition, the respondents argue that the tax is not a general revenue tax because it is calculated on the volume of trash produced and because a portion of it is specifically earmarked for debt service on the waste facility.

Because the Supreme Court has not addressed the issue of subsidies directly, we are not convinced that the source of revenue for a constitutionally permissible subsidy must be "general taxes."[4] However, we agree with the WLSSD that the waste management tax qualifies as a "general tax" within the meaning of *Carbone*. The tax is nondiscriminatory, being applied to essentially all of the occupants, property owners, and residents of the district. Moreover, this broad application of the tax and the fact that the revenue is available for competing recycling and waste projects provides an important political check on the use of the tax to subsidize the waste processing facility. It is irrelevant to the characterization of the tax that it is based upon the volume of trash produced. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981) (holding that a severance tax imposed on amount of coal mined was a "general revenue tax"). Additionally, the characterization of the tax is not altered simply because it is earmarked for a particular project. *See, e.g., Individuals for Responsible Government, Inc. v. Washoe County*, 110 F.3d 699, 704 (9th Cir. 1997) (flat recycling fee paid by all residents "is essentially equivalent to a general property tax targeted to fund a specific county-wide service").

Finding that the tax supporting the subsidy to the WLSSD facility qualifies as a "general tax" does not end the analysis, however. The Supreme Court has stated that the tax and subsidy must be considered together to determine the aggregate effect of the scheme on interstate commerce. *West Lynn Creamery Inc.*, 512 U.S. at 201. In *West Lynn*, the Court considered the constitutionality of a tax and subsidy

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[4] In Justice O'Connor's concurring opinion in *Carbone*, she referred simply to "taxes" as a suggested source of subsidy. *Id.* at 406. Thus, there has not been a uniform insistence upon "general taxes" in the Supreme Court's opinions.

scheme in which Massachusetts taxed all milk sold in the state by dealers and distributed the funds solely to in-state milk producers. *Id.* at 188. The Court noted that, although the tax was levied against all milk dealers evenhandedly, two-thirds of the milk taxed was produced out-of-state. *Id.* When the Court analyzed the tax together with the subsidy, it found that the tax acted like a tariff imposed only on out-of-state products because any burden on in-state interests was mitigated by the subsidy. *Id.* at 194-95.

WLSSD distinguishes the tax in *West Lynn* as a tariff on milk primarily produced out-of-state, while its own tax is a local tax applied solely to trash produced within the district. WLSSD also distinguishes *West Lynn* on the basis of the recipients of the subsidy. In *West Lynn,* the subsidy was provided exclusively to in-state producers of milk, while WLSSD offers its reduced tipping tax to anyone who uses the facility. Thus, WLSSD asserts that its tax scheme burdens only in-state interests and benefits both in-state and out-of-state interests.

Another fundamental distinction presented by WLSSD is that its tax scheme subsidizes a publicly owned facility, whereas the interests subsidized in *West Lynn* were Massachusetts farmers. WLSSD argues that waste management is "the quintessential responsibility of the local government" and, because of this, government can require citizens to pay for the services irrespective of whether they actually use them. Additionally, WLSSD claims that the waste management tax benefits all waste generators in the district, irrespective of whether they use the WLSSD waste facility, by ensuring that a legislatively preferred waste disposal method will always be available to them and by providing the intangible benefits of an enhanced awareness of the need to conserve resources.

Zenith/Kremer and United assert that it is of no particular constitutional moment that the waste management tax is imposed locally on the waste generators, rather than waste haulers. They rely upon the Court's statement in *West Lynn* that "[T]he imposition of a differential burden on any part of the stream of commerce - from wholesaler to retailer to consumer - is invalid because a burden placed at any point will result in a disadvantage to the out-of-state producer." *West Lynn*, 512 U.S. at 202. The respondents argue that, as in *West Lynn*, the true burden of the tax and subsidy scheme is on the out-of-state interests which, in this case, are the out-of-state waste processors. Respondents contend that out-of-state waste processors lose their competitive advantage because their in-district users must pay the WLSSD's waste management tax in addition to the out-of-state tipping fees and do not receive any benefit from the subsidy. However, users of the WLSSD facility are insulated from the effects of the tax because the subsidy allows WLSSD to lower tipping fees at its facility. Respondents assert that the Supreme Court forbade this type of tax and subsidy arrangement in *West Lynn* when it stated, "when a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a State's political processes can no longer be relied upon to prevent legislative abuse, because one of the in-state interests which would otherwise lobby against the tax has been mollified by the subsidy." *Id.* at 200.

We agree with WLSSD, however, that *West Lynn* is inapposite. It is constitutionally significant that the waste management tax is levied on residents and occupants of the district rather than upon the waste haulers because it demonstrates that the focus, purpose, and reach of the tax is entirely local. Furthermore, while we recognize that discrimination may occur at many different levels of commerce, we do not believe that the tax in this case imposes

any differential burden on out-of-state commerce. The use of the waste generation taxes to pay the debt service on a government owned facility, which benefits users of the facility indirectly through lowered tipping fees, is a far cry from the direct cash subsidy found in *West Lynn*. As the second circuit found in *USA Recycling*, "If anyone is 'subsidized' by the user fees, it is the municipal treasury - not any private business. And that, of course, is the point of every tax." 66 F.3d at 1292. Like schools and parks, the waste facility is a municipal service that the government has the right to finance through public fees and taxes, irrespective of whether there may be competing, out-of-state providers. Additionally, unlike *West Lynn*, the waste generators and in-state waste haulers adversely affected by WLSSD's waste management tax had the opportunity to participate in the political process under which the tax was determined. This process includes the legislative debate through which the enabling legislation was created and the public hearings held by WLSSD.

Next, we consider the lower courts' intimations that WLSSD's tax scheme has a discriminatory purpose. Both the district court and the court of appeals regarded the fact that the new tax and subsidy scheme was adopted shortly after the respondents challenged WLSSD's waste designation scheme and announced that their plan to use their Michigan landfill as persuasive evidence of a discriminatory purpose. The court of appeals also noted, as evidence of a discriminatory purpose, the fact that the tax scheme results in virtually no change in the net revenues garnered by WLSSD.

We hold that there is no discriminatory purpose underlying the waste management tax scheme. The tax scheme was adopted to ensure the financial survival of the waste facility while maintaining a volume based system to encourage waste reduction. These purposes are endorsed by the state

legislature in Minn. Stat. § 115A.02 (1996).[5] Furthermore, the Supreme Court has recognized the legitimacy of a state's desire to aid its industries through its repeated suggestion that subsidies are a permissible means. The fact that the total amount of revenue garnered from the new tax system is almost identical to the amount obtained under the single fee simply underscores WLSSD's purpose in obtaining necessary revenue for the facility, rather than a desire to discriminate against interstate commerce.

Since we hold that the tax scheme does not discriminate against interstate commerce, we consider whether the incidental burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The legislature has determined that refuse reclamation facilities are a desirable part of its environmental scheme. Minn. Stat. § 115A.02.[6] The WLSSD facility specifically benefits the community by providing a consistent source of fuel for the

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[5] Minnesota Statutes § 115A.02 furnishes the legislative statement of policy and purposes for the Waste Management Act. It provides in relevant part:

> (a) It is the goal of this chapter to protect the state's land, air, water, and other natural resources and the public health by improving waste management in the state to serve the following purposes:
> (1) reduction in the amount and toxicity of waste generated;
> (2) separation and recovery of materials and energy from waste;
> (3) reduction in indiscriminate dependence on disposal of waste;
> (4) coordination of solid waste management among political subdivisions; and
> (5) orderly and deliberate development and financial security of waste facilities including disposal facilities.

[6] Minnesota Statutes § 115A.02(b), which lists waste management practices according to order of preference by the legislature, places resource recovery through incineration before land disposal.

sewage sludge incineration plant which, in turn, reduces pollution of the St. Louis River area, as well as providing a preferred method of waste disposal. The tax scheme makes these benefits possible by providing for the financial security of the facility, while at the same time providing an incentive to meet the state's goal of reducing waste. As a result of the combination of the tax and subsidy, the WLSSD facility may retain some business which otherwise would have shifted to out-of-state facilities. However, WLSSD's lowered tipping fee also draws business away from in-state waste disposal facilities. In any case, "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 474 (1981). Granting that out-of-state businesses may be more heavily affected by the tax and subsidy scheme than in-state businesses by dint of the state's preference for incinerators (which are perhaps more costly) over landfills, this burden is not clearly excessive in light of WLSSD's substantial interest in ensuring the financial security of the waste facility and promoting waste reduction.

Furthermore, we conclude that there is no other financing option which would serve WLSSD's purposes with a "lesser impact on interstate activities." *Pike*, 397 U.S. at 142. We note that property taxes, the only other type of taxes which the WLSSD is authorized to impose, would have the same effect on interstate commerce as the waste generation tax, would be available for the same purposes, and would be levied on the same population (with the exception of tax-exempt entities). However, property taxes would not further the state's goals of reducing waste and encouraging recycling. Moreover, placing the entire cost of the facility on the tipping fee is not a viable option because it does not ensure the financial health of

facility, nor would it serve the purpose of encouraging everyone in the district to reduce the volume of trash they produce.

As we hold that the tax is not discriminatory as a matter of law and that it poses only an incidental burden on interstate commerce, we remand to the lower court for further action consistent with these conclusions. Although our holding may not entirely dispose of the waste management taxes held by WLSSD on the court's order, we note that the disposition should be controlled by the district court's findings as to the reasonableness of the tax and not by the outcome in the parties' separate federal proceeding.

In sum, we reiterate the importance of the state's initiatives to protect the environment by encouraging waste reduction, resource recovery, and recycling. The state has enacted a well-considered, comprehensive legislative scheme to meet these goals through solid waste management planning. Within the authority of this legislative scheme, the solid waste processing facility run by the WLSSD and the tax and subsidy scheme used to fund it accomplish the state's environmental objectives without discriminating against interstate commerce. WLSSD should be commended for its efforts and the tax should be regarded as a model for other communities.

Reversed and remanded

STATE OF MINNESOTA
IN COURT OF APPEALS
C0-96-1602

Zenith/Kremer Waste Systems, Inc., et al.,
Respondents,
vs.
Western Lake Superior Sanitary District,
Appellant.

Filed January 28, 1997
Affirmed
Randall, Judge
Concurring in part, dissenting in part,
Davies, Judge

St. Louis County District Court
File No. C8-96-600188

Harold A. Frederick, Fryberger, Buchanan, Smith & Frederick, P.A., 700 Lonsdale Building, 302 West Superior Street, Duluth, MN 55802 (for appellant)

Timothy R. Thornton, Jack Y. Perry, Briggs & Morgan, P.A., 2400 IDS Center, Minneapolis, MN 55402 (for respondents)

Considered and decided by Short, Presiding Judge, Randall, Judge, and Davies, Judge.

S Y L L A B U S

1. A waste disposal fee scheme violates the Commerce Clause of the federal constitution where it discriminates in effect against interstate commerce and does not use the least onerous alternatives to promote a legitimate local interest.

2. A district court properly grants summary judgment where the parties do not dispute any issues of fact material to the court's analysis.

OPINION

RANDALL, Judge

Respondent moved for summary judgment on its claim that appellant's solid waste generation and tipping fee scheme violates the Commerce Clause of the federal constitution. The district court granted respondent's motion on the ground that appellant's fee scheme discriminates against interstate commerce and does not use the least onerous means to advance a legitimate local interest. On appeal, appellant argues that its fee scheme is constitutional because it does not discriminate against interstate commerce and because its benefits outweigh any claimed burden on interstate commerce. Alternatively, appellant argues that genuine issues of material fact precluded a grant of summary judgment for respondents. We affirm.

FACTS

Appellant Western Lake Superior Sanitary District owns and operates a waste processing facility (Facility) near Duluth, Minnesota. The Facility derives heat from solid waste in order to assist in processing waste water. To ensure a consistent stream of solid waste for the facility, appellant adopted a waste designation regulation requiring all persons who generate solid waste in appellant's jurisdiction to dispose of it at the Facility. A federal district court has found this waste designation scheme unconstitutional. ***Zenith/Kremer Waste Sys., Inc. v. Western Lake Superior Sanitary Dist.***, Civ. No. 5-95-228 (D. Minn. Oct. 10, 1996).

Respondent Zenith/Kremer Waste Systems, Inc. (Zenith) collects, hauls, and deposits 40 to 50 percent of the solid waste generated within appellant's boundaries. Respondent United Waste Systems, Inc. (United) purchased Zenith. United performs waste collection and hauling services and owns a landfill in Ontonagon County, Michigan. In or about September 1995, shortly after the purchase, respondents informed appellant that they would begin disposing of their Zenith-collected waste in United's Ontonagon County landfill unless appellant reduced its fee for dumping, or "tipping," at the Facility. At the time of respondents' announcement, appellant charged a tipping fee of $63.00 per ton.

Shortly after respondents announced their intentions to dump at the Ontonagon County landfill, appellant adopted a reduced tipping fee of $39.75, effective March 1, 1996. At the same time, appellant began to consider additional fees to finance waste processing costs not covered by the reduced tipping fee. Between October 1995 and January 1996, appellant weighed at least three options for financing various solid waste programs and debt service on improvements to the Facility no longer financed through appellant's tipping fee revenue. Effective March 1, 1996, appellant adopted a waste management fee (management fee) of $28.00 per ton. Appellant imposes the management fee on all solid waste generated in appellant's jurisdiction regardless of where a hauler ultimately dumps the waste. At least 25 percent of the management fee, or seven dollars per ton, finances debt service and operating costs for the Facility. In addition, the management fee finances several programs unrelated to the Facility.

ISSUES

1. Did the district court err in finding that appellant's fee scheme violates the Dormant Commerce Clause?

2. Did the existence of issues of material fact bar the grant of summary judgment for respondents?

ANALYSIS

On appeal from summary judgment, reviewing courts must ask whether any genuine issues of material fact exist and whether the lower court erred in its application of the law. ***State by Cooper v. French***, 460 N.W.2d 2, 4 (Minn. 1990). "On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted." ***Fabio v. Bellomo***, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted). Where the parties do not dispute the material facts, a reviewing court need not defer to the district court's application of the law. ***Hubred v. Control Data Corp.***, 442 N.W.2d 308, 310 (Minn. 1989).

I.

The negative, "or dormant," aspect of the Commerce Clause of the federal constitution bars states from promoting their own commercial interests by restricting the movement of articles of commerce into the state. ***Fort Gratiot Sanitary Landfill, Inc. v. Michigan DNR***, 504 U.S. 353, 359, 112 S. Ct. 2019, 2023 (1992). Waste processing services constitute an article of commerce within the reach of the dormant commerce clause. ***C&A Carbone, Inc. v. Town of Clarkstown, N.Y.***, 511 U.S. 383, 389, 114 S. Ct. 1677, 1681 (1994). Courts will find that a law discriminates against interstate commerce if the law treats in-state and out-of-state

interests differently, was adopted for a discriminatory purpose, or has discriminatory effects. ***Cotto Waxo Co. v. Williams***, 46 F.3d 790, 793 (8th Cir. 1995). Justification for discriminatory laws must pass strict scrutiny. ***Oregon Waste Sys. v. Department of Envtl. Quality***, 511 U.S. 93, 101, 114 S. Ct. 1345, 1351 (1994).

Here, as respondents concede, appellant's fee scheme is facially neutral, because it does not impose different fees on in-state and out-of-state providers of waste processing services. But "a burden * * * upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States * * *." ***Fort Gratiot***, 504 U.S. at 361, 112 S. Ct. at 2025 (citation omitted). As a result, this court will apply strict scrutiny to appellant's fee scheme if appellant adopted the fee scheme for the purpose, or with the effect, of discriminating against interstate commerce. A court will find that a facially neutral law has a discriminatory effect where the law favors in-state interests over out-of-state interests. ***See West Lynn Creamery, Inc. v. Healy***, 512, U.S. 186, 199, 114 S. Ct. 2205, 2212 (1994) (holding that facially neutral milk tax favored in-state dairy farmers over out-of-state dairy farmers); ***see also Carbone***, 511 U.S. at 392, 114 S. Ct. at 1683 (noting that a state or municipality may not "hoard a local resource [such as trash] for the benefit of local businesses that treat it").

In ***West Lynn***, the state of Massachusetts imposed a milk tax on all milk sold to Massachusetts retailers, regardless of the milk's origin. The state then used the proceeds of the tax to subsidize local dairy farmers. The Supreme Court invalidated the tax, despite its apparently even-handed application to all milk sold to Massachusetts retailers, on the ground that because Massachusetts dairy farmers received subsidies from the tax proceeds while out-of-state producers did not, the tax

was effectively imposed solely on out-of-state milk producers. 512 U.S. at 194, 114 S. Ct. at 2212.

Here, appellant imposes the waste management fee on all parties that generate waste within appellant's jurisdiction. At least seven dollars of this management fee covers debt service on improvements to the Facility, thus permitting appellant to reduce its tipping fee to below the amount necessary without the $7 subsidy from the management fee. Haulers to out-of-state landfills pay the entire management fee, but do not receive the "rebate" that haulers to the Facility receive through the Facility's reduced tipping fee. In effect, then, at least seven dollars of the waste management fee, or a seven dollar tax, is imposed only on haulers to out-of-state landfills, and the ability of these haulers to lower their prices to compete with the Facility is impaired accordingly. On these facts, and in light of the disadvantage that the fee scheme imposes on haulers to out-of-state landfills, the district court did not err in finding that appellant's fee scheme discriminates against interstate commerce.

Appellant also asserts that it did not adopt its fee scheme for the purpose of discriminating against out-of-state competition. Because we find that the fee scheme has discriminatory effects, we apply strict scrutiny regardless of whether the fee scheme was adopted for a discriminatory purpose. ***See SDDS, Inc. v. South Dakota***, 47 F.3d 263, 270 (8th Cir. 1995) (holding that strict scrutiny applied where referendum, although not openly declaring a discriminatory purpose, had discriminatory effects).

We note in passing that, while we expressly decline to base our decision on the purpose behind appellant's fee scheme, the record supports the district court's finding of discriminatory purpose. Courts have found a discriminatory purpose behind

facially neutral laws that benefit in-state interests. ***National Solid Waste Management Ass'n v. Williams***, 877 F. Supp. 1367, 1375 (D. Minn. 1995).

Here, appellant benefits at the expense of out-of-state interests to the extent that appellant wins business from out-of-state facilities that cannot compete with appellant's subsidized tipping fee. In addition, shortly after respondents sued appellant for an order declaring appellant's waste designation scheme unconstitutional and announced their plans to use their Michigan landfill in lieu of the Facility, appellant modified its fee scheme to discourage tipping at locations other than the Facility. Moreover, the similarity between the total fees collected under the one-fee plan and under the two-fee scheme tends to negate any avowed nondiscriminatory purpose. Lastly, appellant has offered no nondiscriminatory reason for adopting the management fee-subsidized tipping fee.[1]

A discriminatory law will withstand strict scrutiny only "in a narrow class of cases in which the municipality can demonstrate * * * that it has no other means to advance [the] legitimate local interest." ***Carbone***, 511 U.S. at 392, 114 S. Ct. at 1683 (citing ***Maine v. Taylor***, 477 U.S. 131, 106 S. Ct. 2440 (1986)). Protection of public health and safety and protection of the environment constitute legitimate local

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[1] Contrary to respondent's assertions, appellant's admitted desire to reduce tipping fees in order to compete better with out-of-state waste processors does not compel a finding of discriminatory purpose and strict scrutiny review. Appellant could attempt to compete better with out-of-state landfills for solid waste without having a discriminatory purpose, as by paying a higher price for the waste out of general municipal revenues. It is not the desire to compete, but the desire to discriminate against interstate commerce, that subjects a law to strict scrutiny. ***See West Lynn***, 512 U.S. at 199, 114 S. Ct. at 2214 (approving of subsidies funded out of general revenues).

interests. ***See Fort Gratiot***, 504 U.S. at 366, 112 S. Ct. at 2027 (invalidating law ostensibly enacted for the public health and safety); ***SDDS***, 47 F.3d at 271 (invalidating law where environmental safeguards already existed and the law provided only an incremental amount of protection). A discriminatory law designed to serve legitimate local interests will not withstand strict scrutiny, however, if other, less onerous alternatives exist to serve those interests. ***Fort Gratiot***, 504 U.S. at 367, 112 S. Ct. at 2027.

Carbone involved a commerce clause challenge to a waste flow control law. ***Carbone***, 511 U.S. at 388, 114 S. Ct. at 1681. After concluding that the challenged law discriminated against interstate commerce, the court considered whether any less onerous alternatives existed to promote the public health and safety, the local interests allegedly served by the law. ***Id.*** at 392-93, 114 S. Ct. at 1683. Justice Kennedy, for the court, noted that no nonprotectionist means could ensure, as the challenged flow control law did, that the town-sponsored facility would remain profitable. ***Id.*** 393, 114 S. Ct. at 1684. The court nonetheless invalidated the law on the ground that the flow control law was in essence a financing measure, and less burdensome alternatives, such as general taxes, existed to serve the town's financing needs. ***Id.***

Here, appellant contends that its fee scheme preserves the environment and protects the public health and safety. Appellant asserts that by ensuring the competitiveness of its tipping fees and a steady flow of solid waste to its facility, appellant reduces demand for nonrenewable fuels and guarantees local residents access to a nearby waste processing station. Because the fee scheme ensures the long-term profitability of the Facility and thus the long-term ability of the Facility to process waste, the fee scheme does, indirectly, serve local interests cited by appellant.

Though the fee scheme promotes these legitimate local interests, it nonetheless violates the Commerce Clause. Appellant concedes that, as in ***Carbone***, the scheme challenged here is, at its core, a financing measure. And, as in ***Carbone***, appellant could ensure the Facility's competitiveness and long-term survival through nondiscriminatory means. Appellant could finance lower tipping fees through an increase in assessments to the municipalities it serves. ***See*** Minn. Stat. § 458D.09, subd. 1 and 2 (defining current costs and method of allocating costs among local government units served by appellant). The district court properly found that appellant failed to sustain its burden of proving that its fee scheme represents the least onerous alternative for promoting the fee scheme's legitimate purposes. Continued operation of the Facility may promote the local public health and safety. But the Commerce Clause requires that local residents pay their fair share of the cost of this benefit.

Appellant urges this court to review appellant's fee scheme under the ***Pike v. Bruce Church***, 397 U.S. 137, 90 S. Ct. 844 (1970), balancing test. A law will withstand constitutional scrutiny under the ***Pike*** analysis if the law has only incidental effects on interstate commerce and those effects are not clearly excessive in relation to the law's local benefits. ***Pike,*** 397 U.S. at 142, 90 S. Ct. at 847. This balancing test applies, however, only where a court finds that the challenged law does not discriminate against interstate commerce facially, in purpose, or in effect. ***Id.*** at 142, 90 S. Ct. at 847. Because we find appellant's fee scheme discriminatory, we do not apply the ***Pike*** analysis to appellant's fee scheme.

Even if we did apply the ***Pike*** test here, we could find that appellant's fee scheme violates the Commerce Clause. Appellant's fee scheme imposes at least a seven dollar

disadvantage on competitors of the Facility. A disadvantage, or tax, of seven dollars in this market represents a significant portion[2] of the parties' tipping fees -- not an incidental burden on interstate commerce.

Appellant also maintains that its fee scheme constitutes a valid regulation of commerce as a valid tax and/or user fee. As appellant concedes, the Supreme Court's analysis of the constitutionality of taxes and user fees requires that the challenged laws not discriminate against interstate commerce. ***See Complete Auto Transit v. Brady***, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079 (1977) (stating that in order to be valid, a tax must, inter alia, not discriminate against interstate commerce). Because appellant's fee scheme discriminates against interstate commerce, the fee scheme does not constitute a valid tax or user fee.

II.

Appellant argues that genuine issues of material fact precluded the grant of summary judgment in favor of respondents. Appellant contends that a genuine issue of material fact exists as to whether the Facility benefits waste generators whose haulers take waste to a processor other than appellant. A district court will grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories, and affidavits and admissions on file show that no genuine issue of material fact exists and that either party is entitled to a judgment as a matter of law. Minn R. Civ. P. 56.03; ***see***

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[2] Seven dollars represents a reduction of approximately 15 percent in the $46.75 tipping fee appellant would charge in the absence of the management fee subsidy and an even larger percentage of the tipping fees charged by respondents at their landfill.

Fabio, 504 N.W.2d at 761 (affirming grant of summary judgment).

Here, respondents are entitled to prevail on their claim upon showing that appellant's fee scheme discriminates against interstate commerce and upon appellant's failure to show that it employed the least onerous alternatives to promote a legitimate local interest. ***See Carbone***, 511 U.S. at 392, 114 S. Ct. at 1683 (stating that discriminatory laws are per se invalid except where municipality shows it has no other means to advance its legitimate local interest). An evaluation of the local benefits provided by the fee scheme is not material to this analysis. Such an assessment would affect the outcome of the case, and therefore be material, only if this court found that the fee scheme regulates in a nondiscriminatory way and only incidentally burdens interstate commerce. ***Pike***, 397 U.S. at 142, 90 S. Ct. at 847. Because we conclude appellant's fee scheme discriminates against interstate commerce, the existence of local benefits attributable to the fee scheme does not constitute a contested issue of fact sufficient to bar the grant of summary judgment for respondents.

Appellant also asserts that a genuine issue of material fact exists as to the cost of out-of-state disposal of solid waste. The cost of out-of-state disposal relates to the ability of out-of-state haulers to compete with appellant's processing facility. However, "out-of-staters' ability to remain competitive by lowering their prices [does] not immunize a discriminatory measure." ***West Lynn***, 512 U.S. at 195, 114 S. Ct. at 2212. As a result, an assessment of out-of-state disposal costs would not affect the outcome of this case. Thus again, although it might be "in dispute," it is not a contested issue of fact of the kind needed to preclude a party from seeking summary judgment.

DECISION

The district court properly found that appellant's fee scheme is discriminatory, and that appellant could use less onerous alternatives to promote the interests advanced by its fee scheme. No genuine issues of material fact exist to preclude a grant of summary judgment.

Affirmed.

DAVIES, Judge (concurring in part, dissenting in part).

I write separately only to express my dissent on the remedy awarded.

I would not set aside 100 percent of the waste disposal fee collected by appellant Western Lake Superior Sanitary District. Instead, we should remand to the district court for a determination of the percentage of the fee that unlawfully impacts interstate commerce. Appellant should be required to return only that unlawful portion.

The resolution I propose is consistent with that in ***Johnson Bros. Wholesale Liquor v. Commissioner of Revenue***, 402 N.W.2d 791 (Minn. 1987). In ***Johnson Bros.***, the Minnesota Supreme Court first observed:

> The harm caused by a discriminatory tax on interstate commerce is that it puts such commerce at a competitive disadvantage relative to local commerce. Logically, the disadvantage suffered by relators could have been corrected either by extending the lower rates of section 340.-436 to all wine producers or by severing the statute from the chapter and thus raising taxes for merchants of Minnesota wine.

> The United States Supreme Court has recognized that either of these means of equalizing taxes is an acceptable remedy to unconstitutional discrimination.

Johnson Bros., 402 N.W.2d at 793 (citations omitted). The court then affirmed a tax court decision that equalized excise taxes as the remedy for a discriminatory excise tax statute by collecting back taxes from those who had benefited from the discriminatory tax. ***Id.*** The concept of simply redressing the improper financial effect of a discriminatory fee or tax should guide our disposition in this case.

The part of the waste disposal fee that is not discriminatory is simply irrelevant to this case. Further, setting aside, in its entirety, the fee that has been collected since March 1, 1996, gives respondents a windfall and, without justification, damages appellant's financial strength. Return of the unconstitutional portion of the fee should be the extent of our concern.

STATE OF MINNESOTA **IN DISTRICT COURT**

COUNTY OF ST. LOUIS SIXTH JUDICIAL DISTRICT

ZENITH/KREMER WASTE SYSTEMS, INC.AND UNITED WASTE SYSTEMS, INC.,

FILE NO. C8-96-600188

Plaintiffs,

vs.

SUMMARY JUDGMENT ORDER

WESTERN LAKE SUPERIOR SANITARY DISTRICT,

Defendant.

The above entitled matter came on for hearing before me on April 8, 1996, at the Courthouse in Duluth upon plaintiffs' motion for summary judgment. Mr. Timothy Thornton, Esq. appeared for the plaintiffs. Mr. Harold A. Frederick, Esq. appeared for the defendant. The Court, having heard the arguments of the parties, and having reviewed the file and pleadings herein, HEREBY makes the following:

ORDER

1. The Court DENIES plaintiffs' motion for Partial Summary Judgment and GRANTS partial summary judgment in favor of WLSSD in that defendant is adjudged and decreed to be authorized, pursuant to Minnesota law, to charge a reasonable Solid Waste Management Fee;

2. The Court GRANTS plaintiffs' motion for Partial Summary Judgment in that defendant WLSSD's Solid Waste Management Fee and Tipping Fee scheme are hereby adjudged and decreed to constitute an illegal burden under the United States Constitution on such interstate commerce as is legally permissible involving solid waste generated within the WLSSD District;

2. Waste management fees collected by defendant shall be held by it at interest in a segregated account pending the further order of this Court as provided in the memorandum accompanying this Order; and

3. The attached memorandum shall constitute part of this Order.

Dated at Duluth, Minnesota, this 3rd day of July, 1996.

BY THE COURT:

_____

Terry C. Hallenbeck, District Court Judge

JUDGMENT

I HEREBY CERTIFY THAT THE FOREGOING CONSTITUTES THE PARTIAL SUMMARY JUDGMENT OF THE COURT.

WITNESS THE HONORABLE TERRY C. HALLENBECK, JUDGE OF THE DISTRICT COURT, AT DULUTH, MINNESOTA THIS 3RD DAY OF JULY, 1996.

GLORIA POTHAST
COURT ADMINISTRATOR

BY_____, Deputy

MEMORANDUM OF LAW

This matter comes before the Court upon the motion of plaintiffs' summary judgment. While numerous facts are in dispute the significant ones are not. Thus, although the Court is mindful of the caution with which such motions must be approached at the early stages of a proceeding, it has nonetheless concluded this matter is ripe for decision.

BACKGROUND

Western Lake Superior Sanitary District (WLSSD) owns and operates a facility for the handling of municipal waste, both solid waste and waste water. The facility employs the salutary approach of using products from the solid waste stream as a heat source to assist in processing the waste water. To assure a stream of solid refuse for a heat source WLSSD has imposed a system of designation that requires all such matter generated within the area under its control to be brought to its facility.

This so-called designation system has been made the subject of a challenge by plaintiffs here in an action now pending before another court. As here, that challenge is premised, at least in part, on an alleged violation of the Commerce Clause of the United States Constitution. (Article I, Section 8, Clause 3). Zenith/Kremer Waste Systems, Inc. (Zenith) and United Waste Systems, Inc. (United), plaintiffs, also rely upon the Commerce Clause in this matter although the precise thrust of the challenge differs.

This court is asked to access whether the fee system under which solid waste is managed by WLSSD is so structured and administered as to violate constitutional strictures placed upon the states and, through them, their subdivisions as they undertake to deal with or affect interstate commerce. Before an assessment may be made of the issues

thus arising a review of the fee system and the context in which it is employed is necessary.

The WLSSD facility was constructed some years ago in response to growing concern over pollution issues. The more significant part of the costs of construction was supplied by Federal and State funds. About ten million dollars of the original cost was borne by waste water users in the communities served by WLSSD. Through the ensuing years various policy changes and plant modifications gave rise to the need to finance additional sums for the facility. In primary measure this was accomplished through bonding to service the debt and pay operating costs. An income stream has been created by imposing so-called tipping fees which are charges per load to dump solid waste at the facility. Over time the tipping fee increased to the point where in 1994 it was $63.00 per ton. (It had been $3.84 when the facility went on stream.)

Until March 1996 the tipping fee included sums allocable to operating costs and debt service for the solid waste facility. It also included the costs of various recycling, hazardous waste and other special waste disposal and educational programs provided to the geographic area served by WLSSD.[1] For reasons which are in dispute and which bear upon the matter now before the court, the structure of the fee scheme was changed effective March 1996.

In approximately September 1995 Zenith was purchased in a stock sale transaction by United. United is a multi-state waste disposal enterprise which operates one or more landfills as well as various waste collection (hauling) business. One of United's landfills is located in Ontonagon, Michigan. This site is approximately 380 miles round trip from Duluth, Minnesota, the location of the WLSSD plant whose fee income stream is

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[1] Responsibility for such efforts comes within the broad charge given to WLSSD to administer waste control and disposal within its geographical territory.

here at issue. Subsequent to the purchase being finalized, plaintiffs advised WLSSD they would henceforth be hauling solid waste collected from customers within the WLSSD geographic sphere to the Ontonagan County landfill for disposal unless the WLSSD tipping fee were lowered. Apparently plaintiffs had concluded they could dispose of the solid waste at a lower cost, even considering the costs of handling and transport, at the landfill as compared with costs incurred to use the WLSSD plant.

Within a short time after plaintiffs' announced intention concerning their future handling of solid waste collected, WLSSD lowered its tipping fee to $39.75 per ton from the previous rate of $63.00 per ton. Plaintiffs contend the $39.75 figure was selected because it served to make it uneconomical to haul solid waste to the Ontonagon County landfill site, the costs of transport and the tipping fee incurred there rendering the comparative cost prohibitive.

WLSSD thereupon also began to assess whether it should further modify the structure of its fee system. The precise reason for the consideration of a modification at this time is a fact the parties vigorously dispute. Plaintiffs ascribe the exercise to their announcement regarding use of the United landfill. Defendant contends it merely determined it would be more appropriate to separate non solid waste facility costs from other program, operational and debt service expenses incurred in the management and operation of the WLSSD programs. As will be discussed below, the court finds the proximity between plaintiffs' announcement and the fee change decision persuasive as to the motivation but such fact is not determinative in the court's decision. Whatever the reason, WLSSD decided to impose a new fee in addition to the former tipping fee.

Effective March 1996 WLSSD imposed the new fee scheme. Its income stream allocable to solid waste disposal efforts would henceforth be derived from two, rather than one,

fee source. The former tipping fee in its new lower amount is retained. An additional "solid waste management" fee now is also charged to generators of solid waste. The latter fee is nominally based on weight but for purposes of collection is converted into approximately volume equivalents. Thus a homeowner or other generator is charged a sum for each 32 gallon garbage can of solid waste he may generate within the WLSSD district. At the present time, July 1996, the solid waste management fee is $28.25 per ton of solid waste.

In the original reduction of the tipping fee WLSSD had suffered a lost of $23.25 per ton by reason of the reduction of the fee from $63.00 to $39.75 ($63.00 - $39.75 = $23.25). Between the date of that reduction and the imposition of the new waste management fee WLSSD had concluded its costs of operation has risen by $5.00 per ton, apparently for reasons wholly unrelated to the dispute now before the court. The net result, in dollar terms, of the new fee program therefore is reinstatement of WLSSD, at least approximately, of the per ton cash receipts it was garnering prior to plaintiff's announcement plus an additional $5.00 per ton to cover added costs it is incurring in its overall operations. ($23.25 + $5.00 [waste management fee] + $39.75 [tipping fee] = $68.00 per ton).

Plaintiffs contend this scheme discriminates against interstate commerce in such manner and to such extent as to violate the Commerce Clause or, more accurately, the so-called dependent commerce clause subsumed therein.[2] This is so, plaintiffs allege, because a significant part of the burden of the waste management fee falls upon interstate commerce to

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[2] Perhaps a more apt characterization of the state-limiting character of Article I, Section 8, Clause 3 of the United States Constitution is to term it a "negative" empowerment of States in the area of interstate commerce. See C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 114 S. Ct. 1677 (1994)(Souter, J., dissent); West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994)(Scalia, J., concurrence).

the benefit of the solid waste plant and without any corresponding benefit to such commerce. As plaintiffs' argument goes, while all waste generators within the WLSSD service area pay the waste management fee only those whose solid waste is dumped at the WLSSD plant derive any benefit from that part of the fee admittedly devoted to plant debt service, and to an amount disputed, its operating costs. A benefit is therefore received by persons using the plant in that a part of the waste management fee pays part of the tipping fee. As the argument asserts, generators who elect to have their solid waste hauled to a location other than the WLSSD facility help defer the cost of its debt service and, arguably, operation and must, in addition, still incur a tipping fee at the ultimate dumping location. Their costs are higher to the benefit of WLSSD plant users whose tipping fee is therefore enabled to be lower.

Non plant users thus incur a duplicate fee to the extent the waste management fee defrays WLSSD plant costs. In effect, plaintiffs contend, this burden is impermissibly borne by interstate commerce in violation of the United States Constitution. Interstate commerce is burdened to the benefit of intrastate commerce.

WLSSD defends its fee structure by various alternate rationale. It correctly notes that only persons within its area of authority in the State of Minnesota pay any part of the solid waste management fee.[3] Such fact is conceded by plaintiffs in the direct sense. It points out further such fee is levied only upon solid waste generated within the State of Minnesota. Such fact plaintiffs concede. If such fee be regarded a tax,

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[3] While the fee is imposed on waste generators, responsibility for its collection and delivery to WLSSD is imposed upon the waste haulers in return for which they receive a collection fee of 4% of sums collected. The haulers bill their customers for the waste management fee as a part of their regular billing process.

WLSSD contends, it is fairly apportioned, falling only upon Minnesota solid waste generation and accessed only upon Minnesota situated generators.

If it be considered a users fee defendant offers that the waste management fee must be judged a) as to its fairness in approximating benefits derived by the payer for use of state facilities, b) as to its discriminatory effect upon interstate commerce, and c) as to its amount in relation to costs incurred by the taxing authorities. So evaluated, WLSSD opines the fee meets Constitutional muster.

Defendant argues the fee scheme does not discriminate against interstate commerce facially, in its effect or its purpose. It points out it may well be possible for solid waste generators within its boundaries to pay the solid waste management fee and have waste disposed of at locations outside Minnesota all at a total cost less than generators who elect to use the WLSSD plant will incur. To express the argument in other terms, no harm–no foul. Or, because any discrimination is not shown to be presently effective in excluding all competition it is not Constitutionally objectionable.

Defendant's final main argument for Constitutional propriety points out the salutary purposes for which it was created, control of pollution and management of waste disposal, and suggests such fact justifies, indeed requires, a balancing test to be employed in evaluating its fee program. Assuming any burden on interstate commerce, an assumption denied, do the benefits thereby derived by the state (WLSSD) overbalance any harm caused? Given the legitimate local purpose of its operations defendant urges the court to conclude its fees are justifiable in the Constitutional sense. Pollution and proper waste disposal are, after all, acknowledged valid and important matters of public concern and safety. Further, WLSSD counsels, there is available no

other reasonable, effective, mechanism by which the same benefits serving the legitimate local interest could be secured.

ANALYSIS

A. Ripeness

The question of whether the matter before the Court for decision is ripe for determination must first be addressed. At the Court's request the parties have filed supplemental briefs on this issue. After careful review, having in mind the overall posture of the situation, the better course, albeit the more aggressive one, is to deal with the issues on the merits at this time.

As noted by plaintiffs, in considering ripeness, whether a court *should* exercise jurisdiction admittedly possessed, a party seeking to invoke the power of the court must show he has sustained or is in immediate danger of sustaining some direct injury. See St. Paul Chamber of Commerce v. Marzitelli, 258 N.W.2d 585 (Minn. 1977). Plaintiffs, under their view, are clearly in this status, alleging as they do that out-of-state waste management services would be employed at a cost savings but for the impact of the disputed waste management fee. It is the fee, they contend, which interferes with their engagement in interstate commerce. Defendant contends it is the WLSSD designation ordinance which prohibits interstate shipment of solid waste generated within the WLSSD district and that therefore there can be no interstate shipment of solid waste generated within the WLSSD district and that therefore there can be no interstate commerce as a matter of law. That the disputed fee may serve to hinder what is not permitted in any event can cause no loss to plaintiffs defendant maintains. WLSSD further points out its system of waste designation, while currently the subject of

a challenge before another court, has not been declared illegal and must be honored by plaintiffs.

For their part plaintiffs point to various holdings of other courts, most of which decisions are cited elsewhere herein, for the proposition that designation schemes are not favored and that WLSSD's will certainly encounter the stamp of invalidity once the parallel litigation is resolved. This Court is thus confronted with the decision of whether the parallel litigation must first be resolved before this matter may proceed. As noted above, the Court has concluded the pendency of the related matter does not preclude addressing the issues before the Court at this time.

The Court considers the issues here contested to be real and imminent rather than abstract and ephemeral. Several factors including 1) the pendency of the parallel litigation before the Federal Court in Minnesota, 2) the requirement that waste haulers collect the waste management fee, incurring the costs, inconvenience and potential liabilities associated with such activity, 3) the assertions by plaintiffs that the disputed fee precludes interstate commerce, and 4) the logical, orderly administration of the resolution of the parties' dispute render this matter ripe.

To proceed by not proceeding, i.e. by awaiting the outcome of the parallel litigation, would leave the parties to address this matter after the other was concluded. Additional time would be consumed, dollars lost, plans put on hold. As well as the parties, the public has an interest in the orderly resolution of these disputes affecting a matter of vital public interest–the proper and orderly disposal of solid waste, an environmentally harmful commodity. By helping to define the parties' rights and obligations in a prompt, reasonable fashion all will be better served.

The Court has noted with interest a recent holding of the Minnesota Court of Appeals, Rice Lake Contracting Corp. et al. v. Rust Envtl. and Infrastructure, Inc. et al., 109:137

Finance & Commerce 30 (June 7, 1996). As here the Rice court concluded the "ripening seeds" of a dispute create a sufficient present controversy to render an issue ripe for determination. As here there was parallel litigation serving to evidence the parties were involved in a genuine dispute where two proceedings, independent and yet related, were being pursued with vigor. At the very least the dispute here is a *ripening seeds* type situation rendering this matter ripe for determination.

B. Standing

Defendant challenges plaintiffs' standing to assert the issues raised in this litigation. Careful consideration has been given to this assertion and the Court has been persuaded by the thoughtful analysis in Robinson Rubber Products Co., Inc. et al. v. Hennepin County, Minnesota, Court File C4-95-220 (D. Minn.) Order and Memorandum 5-14 (March 29, 1996). While the discussion is Robinson necessarily focuses upon standing before the Federal Courts the reasoning applies as well in Federal Constitutional matters presented before the Courts of the State of Minnesota. It is plain the fee program of defendant will have an economic impact upon plaintiffs. In connection with collection activities they will be required to act as a collecting agent with reference to the waste management fee. To the extent they are in the landfill business in Minnesota or elsewhere they will face a competitive disadvantage by virtue of the impact of that portion of the waste management fee used to defray WLSSD solid waste plant operations and debt service, an amount conceded to be at least $7.00 a ton. Out of state landfills may even be squeezed out of the market. There is standing in plaintiffs.

C. Commerce Clause

Having previously summarized, in broad perspective, the relative positions of the parties it remains to analyze them in the light of applicable precedent. In doing so the court will first turn to a review of guiding principals of Constitutional law.[4] After careful review the court has found no more succinct recent expostulation than that contained in a recent opinion of the Eighth Circuit Court of Appeals, SDDS, Inc. v. State of South Dakota, 47 F.3rd 263 (8th Cir. 1995). The thoughtful explanation of the law by the SDDS court justifies an extensive quotation from its opinion.

> The Supreme Court has established a two-step approach to the dormant commerce clause. The first step requires us to determine whether a challenged state measure discriminates against out-of-state articles (i.e., is a protectionist measure). Discrimination may take one of three forms. First, a measure may facially discriminate against out-of-state articles.***[F]acial discrimination is merely one of the ways in which a state may "artlessly disclose an avowed purpose to discriminate."
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> The other two forms of discrimination are more subtle and require us to examine the overall effect of the challenged measures. A second way in which a challenged measure may discriminate is that a facially neutral measure may have a discriminatory purpose.

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[4] For purposes of clarity the Court notes that solid waste and solid waste services (the proper disposal of solid waste) have been held to be items of interstate commerce and thus entitled to Commerce Clause protections. City of Philadelphia v. New Jersey, 437 U.S. 617, 621-22 (1978); C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 114 S. Ct. 1677, 1682 (1994). The parties here do not deny the waste and waste services at issue are "commerce" for Constitutional purposes.

> Third, a facially neutral measure may have a discriminatory effect.
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> At the second step of the analysis, we apply the appropriate level of scrutiny. The Supreme Court has established two levels of scrutiny. The determinative factor is the presence or absence of discrimination against interstate commerce. If the state measure is discriminatory, it is subjected to the "strictest scrutiny," and a "virtually *per se* rule of invalidity" applies. If "other legislative objectives are credibly advanced and there is not patent discrimination against interstate trade," the measure is subjected to a more flexible balancing test.

SDDS, 47 F.3d at 267-68. (citations omitted).

The court has concluded that the fee system employed by WLSSD is not discriminatory on its face.[5] Strict scrutiny will therefore not be imposed on a facially discriminatory level of analysis.

In all likelihood, the purpose for the adoption of the fee system was to discriminate in a financial sense against interstate commerce as a mechanism to assure to the WLSSD plant the solid waste stream it desires for energy purposes. The court must ascribe to defendant knowledge that by 1995 the law had evolved to the point where waste designation measures openly requiring delivery of waste only to specified

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[5] The court's rationale for this conclusion may be gleaned by a review of the holdings in Philadelphia, 437 U.S. at 628-29; Hughes v. Oklahoma, 441 U.S. 322 (1979); Carbone, 114 S.Ct. at 1684; Waste systems v. Martin County, Minn., 985 F.2d 1381 (8th Cir. 1993) and Oregon Waste Systems, Inc. v. Dep't. Envt'l. Quality, 114 S.Ct. 1345 (1994). While an argument for facial discrimination is justified, these cases counsel for a contrary finding. The court has thus proceeded accordingly.

locations was highly suspect if not plainly improper.[6] It is thus understandable why defendant, confronted as it was with plaintiff's announced intention to begin using United landfill in Ontonagan County, would not choose to rely on enforcement of its designation directive already in effect. Instead, it can be concluded, WLSSD chose to accomplish indirectly what it had become ever more clear it could not accomplish directly by outright designation.

Unfortunately for defendant, however, the cases are clear in their holding that use of financial strictures to "encourage" compliance with designation directive is as flawed, and therefore, illegal, Constitutionally as the more open and direct measures and such means are designed to replace.[7] Use of financial measures to accomplish improper ends serves only to make worse what was ill advised from the outset. Based on the record thus far available the Court could therefore readily conclude that defendant's fee program had a discriminatory purpose from the outset. Assuming such to be the case strict scrutiny of the fee program to access Constitutional infirmity would be justified. SDDS, 47 F.3rd at 267. The Court, however, has not found it necessary to bottom its holding herein on purposeful discrimination grounds. The Court now turns to a review of the discriminatory effect of the WLSSD fee program as it was modified and brought into existence in March 1996.

It is the effect upon interstate commerce of the WLSSD fee scheme which the Court concludes defendant to run squarely afoul of the Commerce Clause. Such is apparent

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[6] See, e.g. Carbone, 114 S.Ct. at 1680-84.

[7] An opinion of the United States District Court of Minnesota is instructive on this point. In National Solid Waste Management Ass'n v. Williams, 877 F. Supp. 1367 (D. Minn. 1995), the court found a fee "encouragement" scheme apparently designed to secure designation compliance to be unconstitutional on Commerce Clause grounds.

from the record before the Court and such fact renders it appropriate that relieve be accorded to plaintiffs.

As contended by plaintiffs, the situation at bar bears marked similarities to the situation before the Supreme Court in West Lynn Creamery v. Healy, 114 S.Ct. 2205 (1994). Admittedly the item of commerce there involved was not solid waste or solid waste serviced but milk. Nonetheless, the analysis of West Lynn, particularly in light of other holding so the Supreme Court, dictates that plaintiffs must be accorded relief here. We turn to West Lynn.

The State of Massachusetts had imposed a system of pricing for milk solid within its borders. All fluid milk sold by dealers to retailers within the state was subject to an assessment. Although most of the milk so sold was produced out of the state it was subject to the assessment. The funds thus derived were distributed to in-state milk producing farmers. Purpose of the program was to secure the financial health of the state's dairy farm industry. The selling dealers ought injunctive relieve contending the assessment constituted an unlawful burden upon and interference with interstate commerce. For its part the state contended its assessment was non discriminatory, falling on all milk sold by the dealers to retailers regardless whether the milk was produced in-state or out, and that its subsidy was valid because subsidies are Constitutional exercises of state power. The West Lynn court concluded that even if each component of the Massachusetts pricing system might be Constitutionally permissible, in tandem they were not.

It noted a pure subsidy funded out of general revenue ordinarily poses no burden on interstate commerce but merely assists local business. However, because the subsidy in West Lynn was funded from assessments upon milk produced out-of-state, thereby burdening interstate commerce, it was held unconstitutional. The State's argument that two supposedly

Constitutional parts must of necessity combine to make a Constitutional whole was fatally flawed. So too here.

Defendant's contention that a distinction must be drawn because its fee scheme acts to affect exports, if anything, as opposed to imports, as in West Lynn, is unavailing. A similar construct was proffered by the defendant in C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 114 S.Ct. 1677 (1994). As the court there noted, what makes garbage a profitable business is not its own worth but the fact that its possessor must pay to get rid of it. In other words, the value associated with it is not intrinsic but in the fact funds must be expended to get rid of it. Carbone, 114 S.Ct. at 1682. And, denial of the opportunity to afford others, for consideration, disposal services is to deny the opportunity to derive profit from such enterprise. If the proffered service is to be rendered out of state, through transport and disposal of the waste there, the denial impacts interstate commerce.[8]

Admittedly, Carbone is a designation case, dealing with state governmental efforts to control the flow of commerce by directly dictating the manner of flow rather than accomplishing the same result by indirect means. However, it is the ends and not the means which must be examined. It is the effect upon interstate commerce which determines whether Constitutional guidelines have been met. Further, the extent of the effect need not be great to run afoul of the Commerce Clause.[9]

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[8] Also of note is Hughes v. Oklahoma, 441 U.S. 322 (1979) wherein a state's efforts to burden the export of minnows from within its borders was proscribed.

[9] The volume of commerce affected measures only the extent of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce. As we have only recently reaffirmed: 'Our cases . . . indicate that where discrimination is patent, as it is here, neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need to be shown . . . . Varying the strength of the bar against economic

Although the practical effect of the WLSSD fee program has been reviewed to some extent above the Court will again allude to its operative attributes to point out the basis upon which it has decided the Commerce Clause has been violated. To begin, it is plain that the waste management fee does in fact subsidize the WLSSD plant by being used, in part, to defray its debt service costs and its operating costs. As the Court concluded in West Lynn, imposing a financial burden on out-of-state concerns to subsidize in-state business is impermissible. That is precisely what happens here. Waste generators within the WLSSD territory have no choice but to pay the waste management fee regardless where they may ultimately elect to dispose of their solid waste. Should they elect to deal with a collection concern that employs out-of-state disposal at landfill or other facility the local generator pays twice to the extent funds from the waste management fee are used to defray plan costs. This is so because the waste collector will impose the entire waste management fee upon the local generator as it must under the WLSSD fee program.[10] Reasonable and customary business practices ordain such collector will then also pass along to the local generator whatever tipping fee or other fee it may incur when it disposes of the waste at an out-of-state location.

The net result of this manner of fee imposition is that interstate commerce bears the ultimate burden of such part of

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protectionism according to the size and number of in-state and out-of-state firms affected would serve no purpose except the creation of new uncertainties in an already complex field'" Wyoming v. Oklahoma, 112 S.Ct. 789, 801 (1992)(citations omitted). This Court recognizes that the Court in Wyoming determined the regulation there at issue was facially discriminatory. The Constitutional sentiment with which discriminatory measures will be examined is nonetheless apposite in this Court's view.

[10] Failure to impose and collect and remit the fee to WLSSD can result in criminal sanction and loss of licensure under the WLSSD program.

the waste management fee as serves to defray WLSSD solid waste plan costs. Stated otherwise, to the extent the fee program dissuades local generators and haulers from transporting solid waste to foreign locations for disposal or treatment interstate commerce is denied income that would be derived at the out-of-state location. To the extent the waste is nonetheless hauled outstate it pays a toll, that part of the waste generation fee going to pay WLSSD plant debt and operational costs, for the "privilege." Such is prohibited by the Commerce Clause.

Defendant points out that the purpose of its existence as a creature of state government and the aims of its programs are of such concern and importance as to mandate a balancing standard of review when accessing effects upon interstate commerce. It suggests the court should look to the holding in Pike v. Bruce Church, Inc., 397 U.S. 177 (1970) which, when a regulation treats inter- and intrastate commerce evenhandedly in order to accomplish a legitimate local public interest and any effects on interstate commerce are incidental, held that a balancing test may be employed. The court, however, has concluded the effect of defendant's fee system is to provide economic protectionism favoring in-state economic interests at the expense of out-of-state competitors and that the system must therefore meet a per se test of invalidity. See Oregon Waste Systems, Inc. v. Dep't Envt'l Quality, 114 S. Ct. 1345, 1350 (1994). In view of the court's determination in this regard, analysis under the Pike rationale is neither necessary nor appropriate.

In any event, while states may require interstate commerce to bear its fairly apportioned share of state tax burdens, or to "pay its way," a state may not exact more than a "just share" from interstate commerce. The waste management fee imposed upon interstate commerce here constitutes a burden thereupon which bears no reasonable relation to any benefit derived from the State by such

commerce. As a result waste disposal services, the commerce here at issue, are effectively dissuaded from entry into the state to the economic advantage of local business.[11] The Commerce Clause mandates otherwise.

As to approximating benefits received by the payer (generator for purposes of this part of the analysis), defendant points out the amount of the waste management fee allocable to defraying costs associated with the solid waste plant is about $7.00 per ton or, stated otherwise, 25% of the waste management fee. Because the waste management fee defrays costs of programs benefiting all citizens within the WLSSD area of geographic responsibility the Court is urged to conclude the $7.00 or so which goes toward plant-related costs does not result in an unreasonable approximation in making a cost-benefit analysis. Similarly, WLSSD contends any discriminatory effect upon interstate commerce is too small to be of Constitutional concern. Even if a Pike analysis were appropriate here the Court does not find defendant's argument persuasive. The effect is not small and the burden is very real.

A brief review of another waste management case arising from within Minnesota is instructive on the appropriateness of a Pike analysis. In Waste Systems v. County of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993), a county ordinance had been passed which required all solid waste capable of being composted to be taken to a county facility. It was not

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[11] That the local business benefited here is a state owned and run facility, the WLSSD solid waste disposal plant, does not change the result. Whether the in- state commercial interest benefited is a governmental or a private enterprise, a discriminatory effect upon interstate commerce is equally proscribed. This may be said to be a teaching of Carbone although a vigorous dissent by Justice Scalia argued for the provision of significant accommodation where the local interest beneficent of the discrimination is a public institution carrying out a public purpose.

permitted to haul such waste material out of the county. In connection with the design of the county's composting facility a study had been undertaken and a "plan" promulgated. The conclusion was reached that a *critical* element in assuring success, in terms of reliability and financial security, of the facility would be a guaranteed flow of waste. It was concluded the facility's financial security was absolutely dependent on a guaranteed waste supply. Designation was "necessary" in the county's view. A designation regulation was therefore adopted. The benefit perceived to result was assurance of a revenue stream to the facility which, as here, might be used to retire the bonds issued with regard to its operation.

"When a court determines whether a regulation should be examined under Pike, the first requirement is that the regulation must treat intra- and interstate commerce evenhandedly. In other words, it must not overtly discriminate against interstate commerce." Waste Systems, 985 F.2d at 1386. The fee system of defendant here does not treat both aspects of commerce evenhandedly but rather overtly discriminates against interstate commerce. It does so by exposing it to a financial burden that intrastate commerce is not required to bear. As here, the defendants in Waste Systems contended any financial burden on interstate commerce was incidental because the financial burden of the plant did not rest on interstate commerce. They contended the burden lay on the local waste generators because it was they who paid the fee incurred at their plant rather than the fee which would have been incurred at the out of state landfill operated by Waste Systems. The Waste Systems court was no more convinced by this analysis than is this Court. Because the landfill tipping fee which would have been paid to Waste Systems at its out of state location was paid instead to the Martin County facility such sum was "removed" from interstate commerce. Admittedly the sum there in question

was not the entire burden of the Martin County plant operation but the court held it was not merely an "incidental" burden. It was therefore unconstitutional. The parallel here is readily apparent. The result must be the same.

A careful analysis of the issue sin play here requires an examination of the question whether it is of Constitutional moment that the matter at bar challenges a fee system rather than a direct regulation mandating delivery of solid waste to the affected facility as was the case in Waste Systems and others of the cases relied upon by this Court. It is, after all, a well recognized power of a state to tax its citizens and activities carried on within its borders. The power to impose user fees is likewise not subject to dispute. Such does not validate the WLSSD fee scheme, however. As noted above,[12] reference to National Solid Waste Management Ass'n v. Williams, 877 F. Supp. 1367 (D. Minn. 1995), dispels any notion a financially-imposed system of designation is any more acceptable than direct designation as a mechanism to steer commerce out of interstate channels and into intrastate ones. To the same effect is the holding in Oregon Waste Systems although the surcharge there imposed was intended to discourage, or had the effect of discouraging, the importation of out-of-state waste into Oregon for disposal at in state facilities.

Understandably plaintiffs place reliance on a recent order of the Eighth Judicial District (Kandiyohi County) entitled Sanifill, Inc. v. Kandiyohi County, Minn., Court File C4-95-1363 (8th Judicial District) Order and Memorandum (February 8, 1996). While this order and the accompanying memorandum are not binding authority upon this Court, the Sanifill matter bears many striking parallels to the case at bar and the well reasoned holding is worthy of comment. Sanifill, a waste hauler with landfill affiliates, announced its intention

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[12] See Supra note 7.

to henceforth dispose of collected solid waste at facilities other than the one run by the County. At the time of the announcement the County landfill was financed by a per ton fee assessment imposed as a part of the county property taxes and a tipping fee of $50.60 per ton. Shortly after Sanifill's declaration of intent regarding future disposal the County, retaining the assessment, enacted a new fee structure in lieu of the former tipping fee. A waste management fee of $25.60 per ton and a tipping fee of $25.00 per ton were adopted. In financial terms the County was back where it had begun, with $50.60 in fees in hand for each ton of waste generated within the county and deposited at the County landfill. In Constitutional terms, as held by the Sanifill court, a Commerce Clause violation arose because the waste management fee discriminated against interstate commerce in its purpose and effect. As here, generators who chose to employ haulers who disposed of the collected waste out of state, for example, would pay the waste management fee, thereby helping to defray County landfill operating costs, and still incur a tipping fee at the ultimate actual disposal site. No meaningful benefit would be derived by payment of the waste management fee but interstate commerce would be burdened thereby. The effect of the waste management fee was to permit a lower tipping fee to be charged essentially at the expense of interstate commerce and of unfettered lawful competition.

As here, the Sanifill court found the fee scheme was not discriminatory on its face. Unlike here the court found the very purpose of the modified fee scheme was to discriminate. While strong inferences arise as to the motivation of WLSSD in its adoption of the waste management fee this Court, as above indicated, has focused solely upon the discrimination effect of the waste management fee in rendering its decision herein. In doing so this Court has found the Sanifill reasoning and analysis of the effects upon interstate commerce to be very persuasive. In both instances the offending fee has a

neutralizing effect on any competitive advantage which may be enjoyed by out of state disposal facilities.

This Court also has reviewed, and found instructive, Robinson Rubber Products Co. Inc. et al. v. Hennepin County, Minn., Court File C4-95-220 (D. Minn.) Order and Memorandum (March 29, 1996), a designation case without the direct fee structure issues present here. Although a designation case, the Robinson analysis bears fruit meaningful to the resolution of issues in play in the matter at bar. Of particular import is the Robinson court's recognition of the direct link between designation and financing of the Hennepin County facility. In Robinson the county sought to ensure financial viability by creating a group of customers with no choice except to employ the favored facility thus ensuring its success at the expense of interstate commerce. Here WLSSD seeks to ensure financial viability by securing an income stream regardless whether the facility is employed for the disposal of solid waste subject to the waste management fee or not, again at the expense of interstate commerce. The effect is to secure a revenue stream a significant part of which goes to defer the cost of operating the solid waste disposal facility paid by persons who do not use the facility. But, revenue generation is not a local interest that can justify discrimination against interstate commerce. Carbone, 114 S.Ct. at 1684.

A necessary milepost on the analytical road in the assessment of a Commerce Clause challenge is the determination whether, given *per se* invalidity in the case of a discriminatory effect upon interstate commerce, the favored local purpose advanced can be adequately served by nondiscriminatory alternatives. Oregon Waste, 114 S.Ct. at 1351. The avowed purpose here is to secure solid waste generated within the district to be converted into fuel for use in the WLSSD hearth sludge incinerator, employing one waste stream in the treatment of another while conserving fossil fuel and reducing the volume of solid waste. Other alternatives

exist however, nondiscriminatory toward interstate commerce, which would accomplish the stated goals. The tipping fee could be reduced to zero by imposing a general tax as suggested in Carbone. Carbone, 114 S.Ct at 1684. See also Robinson Rubber, Court File C4-95-220 at 31-32.

To the extent conservation of landfill space, reducing the volume of solid waste, is the purpose, such local interest has been held insufficient to justify discrimination against interstate commerce. *See* Waste Systems, 985 F.2d at 1388-89. Simply stated, discrimination cannot be justified by unsubstantiated reference to general health and safety concerns. Carbone, 114 S.Ct. at 1683. See Oregon Waste, 114 S.Ct. at 1351. This Court holds defendant, being subject to strict scrutiny in view of the discriminatory effect of its fee scheme, has not met, and cannot as a matter of law meet, the burden to demonstrate nondiscriminatory measures, equally effective, are unavailable to accomplish its stated goals under the fee scheme.

Defendant points out the similarities between its fee structure and one approved in part by the District Court of Hennepin County in Ben Oehrlein and Sons, et al. v. Hennepin County, Minn., Court File No. 94-12549 (4th Judicial District) Summary Judgment Order and Memorandum (July 28, 1995). Hennepin County imposed a solid waste management fee on all waste generated within Hennepin County. So too here under the WLSSD fee program. While Hennepin County lowered its tipping fee, apparently in tandem with adoption of a waste management fee, the tipping fee was *not* challenged by the plaintiffs in Oehrlein as the Court specifically noted. The Court also stated it was therefore reluctant to invalidate the fee ordinance based upon the proposition than it, when coupled with the waste management fee, rendered the entire scheme Constitutionally flawed. Such seems to this Court to adopt an approach contrary to the teaching of West Lynn. Of course the Oehrlein Court was confronted with the need to address those issues which had been brought before it. As it

clearly noted, the tipping fee was not itself the subject of the matter at bar. No such constraint is present here. Both WLSSD's waste management fee and the particularly tandem reduction of the tipping fee and their effect upon interstate commerce are before the Court. In tandem they trod impermissibly upon the Commerce Clause.

WLSSD suggests support for its position may be found in the holding in USA Recycling, Inc. v. Town of Babylon et al., 66 F.3d 1272 (2nd Cir. 1995). The Court disagrees. The structure of the disposal program in USA bears almost no significant similarities to the WLSSD program in areas that are relevant to these proceedings. There the Town was the collector, having taken over the collection business as a feature of local government. It then contracted out the actual pickup process, after a vigorous, open, competitive bidding process, to a private enterprise. The Town charged a tipping fee of $0, instead financing operation of its disposal facility and the collection costs by means of an assessment on each improved parcel within the collection district. For this assessment each parcel received basic service. If additional collection was desired an additional user fee was imposed only upon those wanting such additional service. The USA court likened the collection service to the provision of a sewer system, public parking, ambulance or other similar public benefit. Defendant's program is so far removed from that of the Town of Babylon as to render USA of little precedential value here.

A. Statutory Authority

Plaintiffs contend WLSSD's solid waste management fee is statutorily unauthorized. Specifically, they allege 1) WLSSD has no power to enact such a fee as there is no explicit legislative grant of authority to do so, and 2) the fee is disproportionate to the benefits received. Defendant contends

its solid waste management fee is authorized under Minn. Stat. §115A.554 and Minn. Stat. §400.08.

This Court interprets the relevant statutory provisions to authorize the imposition of a solid waste management fee. Minn. Stat. §115A.554 accords a sanitary district, such as WLSSD, the same authority and duty as a county with respect to all provisions of Minn. Stat. §400.08, (pertaining to solid waste service charges and areas) except the provision authorizing counties to impose liens on land for unpaid solid waste management charges.

With respect to solid waste service fees, Minn. Stat. §400.08, subd. 3 provides:

> the [sanitary district[may . . . collect just and reasonable charges for solid waste management services provided by the [sanitary district]. The ordinance may obligate the owners, lessees, or occupants of property, or any or all of them, to pay charges for solid waste management services to their properties, . . . and may obligate the user of any facility to pay a reasonable charge for the use of the facility. Rates and charges may take into account the character, kind, and quality of the service and of the solid waste, the method of disposition, the number of people served at each place of collection, and all other factors that enter into the cost of the service, including but not limited to depreciation and payment of principal and interest on money borrowed by the county for the acquisition or betterment of facilities. (emphasis added.)

Further, Minn. Stat. §400.08, subd. 1 defines the types of activities included in solid waste management services as: "recycling and waste reduction services, collection, processing, and disposal of solid waste, closure and

postclosure care of a solid waste facility, and response . . . to releases from a solid waste facility or closed solid waste facility."

Under this Court's interpretation these statutory provisions allow WLSSD to charge a solid waste management fee for costs including but not limited to debt service, recycling programs, other environmental programs, closure and postclosure care, and responses to releases. The Court concludes the fee may be charged in addition to and separately from a fee associated solely with the use of the facility, a tipping or disposal fee. Hence, this Court grants partial summary judgment affirming the authorization of the District to charge a reasonable solid waste management fee. The Court acknowledges there is a factual dispute as to the reasonableness of the solid waste management fee being charged by WLSSD. At this time, the Court is not ruling on whether the fee charged by the District is reasonable. It only concludes WLSSD has the statutory authority to charge an appropriate fee for these services subject to Constitutional restrictions as discussed above.

CONCLUSION

Defendant has the statutory authority to charge a reasonable waste management fee. However, defendant's Waste Management Fee and Tipping Fee scheme constitutes an illegal burden on interstate commerce and is therefore unconstitutional under the United States Constitution. Plaintiffs are entitled to Partial Summary Judgment so declaring with regard to such solid waste as is generated and available for transport in interstate commerce for purposes of disposal. Aware as this Court is of parallel litigation now pending before a sister court regarding the propriety of WLSSD's designation scheme, and out of comity to that court, we decline to enjoin collection of defendant's solid waste

management fee at this time. Sums collected however shall be held by defendant in a segregated account, at interest, pending resolution of the companion case. If there is a determination by our sister court the designation scheme violates the Constitution funds so held shall be promptly returned to their payors with interest at the judgment rate. If there shall be a determination designation is permissible, and interstate commerce in WLSSD district waste thus subject to prohibition, such sums may be employed by WLSSD in support of its operations.

This Court shall retain jurisdiction of this matter with regard to the point at which such funds may be removed from the segregated account.

ZENITH/KREMER WASTE SYSTEMS, INC.,

Plaintiff,

v.

WESTERN LAKE SUPERIOR SANITARY DISTRICT, Defendant.

CIV. No. 5-95-228.

United States District Court, D. Minnesota, Fifth Division

July 2, 1996.

REPORT AND RECOMMENDATION

ERICKSON, United States Magistrate Judge.

I. Introduction

This matter came before the undersigned United States Magistrate Judge upon a referral from the District Court, the Honorable James M. Rosenbaum presiding, in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(B), and upon the Motion of the Plaintiff Zenith/Kremer Waste Systems, Inc. ("Zenith/ Kremer") for partial Summary Judgment.

A Hearing on the Motion was conducted on March 14, 1996,[1] [FN1] at which time Zenith/Kremer appeared by Timothy R. Thornton, Esq., and the Defendant Western Lake Superior Sanitary District ("the District") appeared by Harold A. Frederick, Esq.

For reasons which follow, we recommend that Zenith/Kremer's Motion be granted.

II. Factual and Procedural Background

Zenith/Kremer is engaged in the business of collecting and transporting solid waste, while the District is a political subdivision which, in 1971, was established by the enactment of Minnesota Statutes Chapter 458D, in order to address "serious problems of water pollution and disposal of sewage" in the lower St. Louis River Basin Area of Northeastern Minnesota. 1971 Minnesota Laws Chapter 478, Section 1, codified as amended at Minnesota Statutes Section 458D.01. As a result of a variety of environmental assaults to the St. Louis River, which traverses the southern portion of the District's boundaries, forms an embayment which adjoins Duluth, Minnesota, and discharges into the western aspect of Lake Superior, the District was established to effect the recovery of the River and its surrounding environs.[2] Affidavit of Kurt N.W. Soderberg, at 11 6; Minnesota Statutes Section

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[1] Following the close of the Hearing, the parties have submitted extensive post-Hearing materials, the last of which was received on June 5, 1996. These materials have now been considered, and the matter is ripe for resolution.

[2] The District emphasizes, and it is not otherwise disputed, that a "remarkable and rapid recovery of the St. Louis River[,] within the area of the District[,] occurred and continues today." Affidavit of Kurt N.W. Soderberg, at 11 53. We accept this averment as true.

458D.02, Subdivision 2. Geographically, the boundaries of the District embrace an area of approximately 500 square miles, in which are encompassed the Cities of Duluth, Cloquet, Carlton, Scanlon, Wrenshall, Hermantown, Proctor and Thompson. This action arises out of the District's enforcement of a program of waste designation that is commonly known as "flow control."[3]

Consistent with it legislative authorization, the District decided, in 1973, to construct a regional waste water treatment plant, which was designed to employ a multiple hearth sludge incinerator as one means of waste disposal. Affidavit of Kurt N.W. Soderberg, at 11 21. During the preliminary design of the plant, it was anticipated that fuel oil would be used in the hearth to incinerate the waste water sludge that would be generated as a residue of the waste water treatment process. Affidavit of Kurt N.W. Soderberg, 11 21. Id. However, as a result of concerns over the cost and availability of fuel oil-which the District attributes to the Arab Oil Embargo--efforts were undertaken to assess the feasibility of burning a mixed solid waste ("MSW"), or garbage, as a substitute fuel in the incineration of the sludge. Id. at X 22-23.

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[3] As defined in Minnesota Statutes Section 115A.81, Subdivision 2, "'[d]esignation' means a requirement by a waste management district or county that all or any portion of the solid waste that is generated within its boundaries or any service area thereof be delivered to a processing or disposal facility identified by the district or county."

In the parlance of solid waste management, "[f]low controls are legal authorities used by State and local governments to designate where [mixed solid waste] is taken for processing, treatment or disposal." United States Environmental Protection Agency 's Report to Congress on Flow Control and Municipal Solid Waste (March 1995), Exhibit 7 to Affidavit of Jack Y. Perry.

At the District's instance, in 1974, the Minnesota Legislature amended the District's enabling legislation in order to allow it to regulate and control the management and disposal of the solid waste that would be generated within the District's boundaries.[4] At that time, solid waste collection in the City of Duluth was being performed by private MSW collection companies, who were disposing of the waste at the Rice Lake Landfill, which was located on the outskirts of Duluth. The landfill was owned and operated by the Duluth Disposal Company, whose shareholders exclusively consisted of private MSW haulers. Prior to passage of this amendment, the director of the Duluth Disposal Company is purported to have inquired, during a meeting conducted at the District' s offices,

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[4] As set forth in the enabling legislation, in creating the District, the Minnesota Legislature intended to provide "for the protection of the public health and safety of the area, * * * for the prevention, control and abatement of water pollution and disposal of solid waste in the area, and for the efficient and economic collection, treatment and disposal of sewage and solid waste * * *." Minnesota Statutes Section 458D.01.

Consistent with this expressed intent, the District's Mission Statement provides as follows:

The mission of [the District] is to protect the environment through effective programs of waste management and abatement. [The District] will strive toward a standard of excellence by meeting all environmental standards and permit conditions, establishing and maintaining effective community and employee relations, operating cost effectively with a strong program for facility maintenance and improvements, and developing a continuous long range program of planning for waste management and facility capacity.

Affidavit of Jack Y. Perry, Exhibit 2, Mission Statement.

The District emphasizes these expressions of intent to underscore it close involvement in matters of public safety and health, while Zenith/Kremer focuses upon the expectation, contained in both expressions, that the District's treatment of solid waste will exact both efficiencies and economies.

concerning the effect that the District's capacity to regulate solid waste management might have upon the business interests of the private haulers. Id. at 1128. Apparently in response to these concerns, the District, which was drafting the suggested amendment, proposed a limitation that would exclude it from entry into the solid waste collection business, and that would obligate the District to acquire the Rice Lake Landfill from the Duluth Disposal Company, if the District decided to operate a solid waste disposal facility. Id. at S 33. Subsequently, the Minnesota Legislature adopted the proposed amendment. See, 1974 Minnesota Laws Chapter 377, codified at Minnesota Statutes Section 458D.07, Subdivisions 2 and 5.

Thereafter, the District engaged in a program of solid waste planning and, on May 7, 1975, it adopted a solid waste plan. According to the District, the plan alluded to certain engineering studies which had suggested that the utilization of MSW, as a fuel to incinerate waste sludge, was both cost effective and environmentally advantageous. Affidavit of Kurt N.W. Soderberg, at 11 41. As a result, the plan contemplated that the District would construct a processing facility for converting MSW into fuel, or into a "refuse derived fuel" ("RDF") and, further, that the District would phase out the Rice Lake Landfill as the new facility was drawn into operation. Id.

In order to implement this plan, the District applied for, and received, a combined State and Federal grant which totaled 90% of the cost that was required to build an RDF processing facility, to process the MSW into fuel, and to operate two fluid bed reactors, by which any refuse sludge would be incinerated (collectively, the "Incinerator"). Affidavit of Will Sjoblom, at 11 2. In due course, the plan was

implemented, with the construction costs ultimately exceeding $24 million. Id. at 11 3

In November of 1978, the waste water treatment facility opened but, because of unexpected delays, the Incinerator was not operational until March of 1982. Affidavit of Kurt N.W. Soderberg, at 11 46. Pending the completion of the Incinerator, the Defendant attempted to stockpile sludge, during the winter months, on area farm lands in order that it might be applied during the ensuing summers. Id. at 47. The Defendant avers that, owing to the severity of the winter months, the limited amount of agricultural lands, and expressed public concern, this storage program proved to be unworkable. Id. For reasons not explained, the District also asserts that disposing of the sludge, in landfills, also proved to be unworkable during experiments that were conducted in the latter part of 1980. Id.

Nevertheless, exigencies have caused the District to dispose of the refuse sludge by means other than incineration. For example, on July 15, 1982, after only four months of operation, an explosion occurred at the Incinerator, which resulted in substantial damage to the facility. As a consequence, the District closed the Incinerator and undertook additional modifications. Id. at 11 49. The cost of these modifications totaled $4,360,000, of which approximately one-half was assigned by the District to the solid waste producers. Affidavit of Will Sjoblom, at 11 4. In June of 1985, the Defendant reopened the Incinerator for waste disposal operation. Curiously, notwithstanding the submission of extensive affidavits, the District does not so much as intimate where the refuse sludge was treated, managed or stored during the three year period of time in which the Incinerator was nonfunctional.

The District concedes that, since 1978, it has required the waste collected in the District to be disposed in either the Incinerator or in some other disposal facility of the District's designation. Affidavit of Timothy R. Thornton, Exhibit 13, Defendant's Response to Request for Admissions. According to Zenith/Kremer, from 1979 until the completion of the Incinerator in 1982, the District required all waste to be deposited in its proprietary landfill. Affidavit of Scott Honer, at 11 2. During this period of time, and up until 1992, waste designation was not based upon any formal ordinance or regulation but, rather, the District relied upon its enabling legislation, as contained in Minnesota Statutes Chapter 458D, to dictate flow control.

However, on February 5, 1992, the District adopted Solid Waste Disposal Regulations, which have expressly mandated that "all Mixed Municipal Solid Waste shall be delivered to the [Incinerator]." Affidavit of Jack Y. Perry, Exhibit 5, 1992 Solid Waste Disposal Regulations, Section 3.1. Any failure to comply with this regulatory scheme subjects the violator to a license suspension and to prosecution for a misdemeanor offense. Id., at Sections 16.3 and 17. In addition, the Regulation treats each infraction as "a separate offense * * * for each day on which [the] violation occurs or continues," Id., at Section 17, and, on May 6, 1994, the Regulations were amended to authorize, among other matters, the imposition of a $500 fine for each violation. Affidavit of Jack Y. Perry, Exhibit 6, 1994 Solid Waste Disposal Regulations, Section 20.4.

From 1978 to the present, the Duluth City Council has set, on a regular basis, a maximum charge for the collection of solid waste. The District asserts that, in establishing this charge, the

Council routinely considers both the tipping fee[5] that the collector is obligated to pay the District for the disposal of solid waste, and the collectors' other operating costs. Affidavit of Steve Johnsen, at 11 5. In the District's view, as the tipping fee has increased, so has the maximum rate that the City Council has allowed haulers, such as Zenith/Kremer, to charge its customers for the collection of solid waste. Id.

According to Zenith/Kremer, throughout this period, there have been available solid waste alternatives which were significantly less expensive than the disposal of such wastes in the District's Incinerator. Affidavit of Scott Honer, at 11 3. As but one example, Zenith/Kremer notes that, in 1994, the Incinerator tipping fee was $70.25 per ton, whereas certain out of-state disposal facilities were willing to accept the same waste for $25 to $30 per ton.[6] Id. Moreover, Zenith/Kremer states, and it has not been disputed, that the City of Superior, Wisconsin, which operates a landfill that is located less than 10 miles from Duluth, imposes no more than a $44 per ton tipping fee. Id. at ¶ 4.

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[5] Tipping fees are "the charges established by the District for waste delivered" to the Incinerator or to another designated disposal facility. Affidavit of Jack Y. Perry, Exhibit 5, 1992 Solid Waste Disposal Regulations, Section 2; see also, Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381, 1387 (a tipping fee "is the fee a waste hauler pays to dispose of a load of waste.").

[6] The parties have advised the Court that, on January 22, 1996, the Defendant lowered the tipping fee from $63 to $39.75 per ton but, simultaneously, the District imposed a new "Management Fee" which amounts to $28.25 per ton. We understand that Zenith/Kremer has challenged the validity of this regulation in a separate proceeding that has been commenced in Minnesota District Court and, accordingly, we do not address the "Management Fee" further.

On October 18, 1995, seeking a declaration of its rights, see Title 28 U.S.C. § 2201, Zenith/Kremer commenced this action, contending that the District's promulgation, enforcement and threatened enforcement of solid waste designation is, and has been, constitutionally invalid as in violation of the prohibitions of the Commerce Clause. Alternatively, Zenith/Kremer urges a declaration that the District lacks the statutory authority to designate solid waste,[7]

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[7] In its Reply Memorandum, Zenith/Kremer excuses its non-response to the District's argument, that it possesses the statutory authorization, under the provisions of Minnesota Statutes Chapter 458D, to designate solid wastes, on the ground that the issue is " secondary " to its constitutional challenge. Of course, we entertain a constitutional challenge only if no other means are available to resolve the dispute. See, Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 157 (1984); Cochenour v. Cochenour, 888 F.2d 1244, 1245 (8th Cir.1989). Accordingly, we briefly address Zenith/Kremer's contention that the District's implementation of flow control was ultra vires.

While Zenith/Kremer is correct in observing that the provisions of Chapter 458D do not detail a specific grant of designation authority, when read as an integrated whole, the provisions of the Chapter do explicitly allow the District to "require that only the board shall own, maintain and operate disposal sites and facilities within the District," see Minnesota Statutes Section 458D.05, Subdivision 2, to direct "that every person or local government unit located in the District must dispose of solid waste as provided in the comprehensive plan," see Minnesota Statutes Section 458D.07, Subdivision 4, to "acquire, construct, better, equip, operate and maintain all solid waste disposal sites or facilities within the District," and to acquire or operate existing disposal sites and facilities owned by local government units or private persons, see Minnesota Statutes Section 458D.07, Subdivision 2. In addition, in Section 458D.05, Subdivision 2, the Legislature charged the District with the responsibility of preparing a comprehensive plan for the management and disposition of solid waste within the District, inclusive of establishing "the general location and capacities of needed disposal sites and facilities," and "the type or types of solid waste to be disposed of at each site or facility." Given the breadth of this legislative delegation, we

together with a finding that Zenith/Kremer is entitled to recover monetary damages as a result of the constitutional violation, as allowed by Title 42 U.S.C. § 1983, plus attorneys' fees under Title 42 U.S.C. § 1988.

In turn, the District denies any constitutional violation, and contends that Zenith/Kremer has either waived any arguable constitutional claim, or is without standing to assert the claim at this time. As to the claimed violation of the Commerce Clause, the District does not deny that its deployment of flow control has a financial genesis, but it fervently declares that its decision to designate solid waste was dictated by the waste-to-energy design of its Incinerator, which ameliorates two streams of waste-one solid and the other refuse sludge--in one waste treatment process.[8] Accordingly, the District

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have no occasion to believe that the District was wanting in statutory authority to implement flow controls of one dimension or another.

Likewise, we agree with the District that, when the Legislature enacted the waste designation provisions of Minnesota Statutes Section 115A.80 through .893, the District was expressly excepted from the impact of those provisions by the previous grant of authority under Chapter 458D. See, Minnesota Statutes Sections 115A.82 and 115A.63, Subdivision 3. Had the Legislature intended to apply the provisions of Sections 115A.80 through .893 to the District, then there would have been no purpose in excluding the District from the coverage of those Sections, as is apparent from the language of Minnesota Statutes Section 115A.82.

Accordingly, finding it to have no merit, we do not further address Zenith/Kremer's ultra vires argument, but proceed to its substantive constitutional challenge.

[8] In a post-Hearing submission of June 5, 1996, the District explained the police power bases, for its designation requirement, as follows:

[B]y using the District's MSW as fuel to incinerate the District's sewage sludge each day, the District consumed a substantial portion of one waste stream produced by its population in the environmentally sound treatment of another waste stream produced by the same population. The

contends that its employment of flow control is an exercise of its legislatively granted police power, by which to assure the health and safety of those persons who live and work in the southern St. Louis River Basin.

Not surprisingly, Zenith/Kremer does not agree, and underscores that, for reasons unknown, the District has evaded air quality regulation by any State or Federal permitting authority with the distinct possibility, at least in Zenith/Kremer's view, that the residents of the District are exposed to hazardous, airborne pollutants that are generated by the District's unregulated emissions from the Incinerator's exhausts. In addition, Zenith/Kremer disputes any waiver of its constitutional claims, and any claimed absence of standing, on its part, to advance those claims here.

After a recitation of the Standard of Review which governs our analysis of a Motion for summary disposition, we first

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combination of these two waste streams through an integrated system which effectively processes and/or disposes of both was expressly endorsed by the Water Pollution Control Act Amendments of 1972. * + + Thus, the desirable and legitimate local interest achieved (and important safety and conservation objectives carried out) is not something that the District imagined, rather, Congress has endorsed this legitimate local interest.

Continuing, the District notes:

There are recognized values other than free trade. Legitimate environmental concerns, safety or conservation of the environment stand ahead of free trade unless the environmental or safety objectives can be achieved without negatively impacting commerce.

In contrast, Zenith/Kremer contends that the Incinerator is not an effective enhancement of environmental interests as the facility has been plagued by fires and explosions--with resultant downtime--and, when the facility is operational, it still substantially contributes to local landfill facilities for that portion of the MSW which is not combustible.

address the threshold issues of standing and waiver and, finding that neither precludes our further review, we proceed to Zenith/ Kremer's constitutional claim.

III. Discussion

A. Standard of Review. We are mindful that Summary Judgment is neither an acceptable means of resolving triable issues, nor is it a disfavored procedural shortcut where there are no issues which require the unique proficiencies of a Jury to weigh the evidence and to render credibility determinations. Celotex Corp. v. Citrate, 477 U.S. 317, 327 (1986). Summary Judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, Federal Rules of Civil Procedure. For these purposes, a disputed fact is "material" if it must inevitably be resolved and the resolution will determine the outcome of the case, while a dispute is "genuine" if the evidence is such that a reasonable Jury could return a Verdict for the non-moving party. See, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986) ("An issue of material fact is genuine if it has a real basis in the record.").

As Rule 56(e) makes clear, once the movant presents a properly supported Motion, the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute. While, in addressing the Motion, the Court views the evidence in a light most favorable to the nonmoving party, and gives that party the benefit of every justifiable inference that may be drawn from that evidence, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but * * * must set forth specific facts showing that

there is a genuine issue for trial." Rule 56(e), Federal Rules of Civil Procedure; Krenik v. County of LeSueur, 47 F.3d 953, 957 (8th Cir.1995); State of Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n., 26 F.3d 77, 80 (8th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 483 (1994); see also, Cram v. Lamson & Sessions Co., 49 F.3d 466, 471 (8th Cir.1995); Barnard v. Jackson County, Missouri, 43 F.3d 1218, 1223 (8th Cir.1995), cert. denied, --- U.S. ----, 116 S Ct. 53 (1995).

As noted, in rebutting the showings of the movant, the non-moving party may not rest upon mere denials or the allegations of its pleadings, nor may it simply argue that operative facts will be subsequently developed which will support its claim. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., supra at 586 ("[O]pponent must do more than simply show there is some metaphysical doubt as to the material facts."); see, generally, S. Childress, A New Era for Summary Judgments: Recent Shifts at the Supreme Court, 116 F.R.D. 183, 188 (1987).

Moreover, a party is entitled to Summary Judgment when its opponent has failed "to establish the existence of an element essential to [the opponent's] case, and on which [the opponent] will bear the burden of proof at trial." Celotex Corp. v. Citrate, supra at 322. In such a case, no genuine issue of material fact will be found to exist because "a complete failure of proof concerning an essential element of [that party's] case necessarily renders all other facts immaterial." Id. at 323. "In determining whether a material factual dispute exists, the court views the evidence through the prism of the controlling legal standard." Nebraska v. Wyoming, 507 U.S. 584, 590 (1993). In sum, if reasonable minds could differ as to the import of that evidence, Summary Judgment should not be granted and, in exercising its function,

the Court is not to weigh the evidence. Anderson v. Liberty Lobby, Inc., supra at 250-51; AgriStor Leasing v. Farrow, 826 F.2d 732, 734 (8th Cir.1987).

B. Legal Analysis. The District urges that Zenith/ Kremer is not suited to advance a constitutional challenge on standing and waiver grounds. We disagree.

1. Zenith/Kremer's Standing to Assert the Constitutional Challenge.

Arguing that Zenith/Kremer has passed any applicable tipping fee to its customers, the District asserts that it does not have the standing to now contest the constitutionality of the District's implementation of flow control. The argument has no merit.

a. Standard of Review. To establish standing, a plaintiff must satisfy a three-part test: 1) that he suffered an injury in fact; 2) that a causal connection existed between his injury and the challenged action; and 3) that a favorable decision in the case would likely redress the Plaintiff's injuries. Poor Richard's Inc. v. Ramsey County, Minn., 922 F.Supp. 1387, 1391 (D.Minn.1996); Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). An "injury in fact" is defined as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildiife, supra (citations omitted).[9]

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[9] In addition to the constitutional requirements, Courts have imposed three prudential considerations, which require that: " 1) the plaintiff assert his own rights; 2) the plaintiff's grievance not be a generalized grievance that is pervasively shared and more appropriately addressed by the representative branches of government; and 3) the interest for which protection is sought is within the 'zone of interests'

b. Legal Analysis. Indisputably, the District assesses and collects the tipping fee from waste collectors, such as Zenith/Kremer, who dispose of waste at the Incinerator. See, Lujan v. Defenders of Wildlife, supra at 2137 (When the plaintiff is the object of governmental action, "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will address it."). While the District disputes Zenith/Kremer's standing because the tipping fee has been passed on to Zenith/Kremer's customers, the Supreme Court rejected a similar argument in a Commerce Clause challenge to a liquor tax that was exacted by the State of Hawaii. In Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 267 (1984), Hawaii argued that those liquor wholesalers, who had paid the challenged tax, were without standing to challenge its validity since they had been able to pass the tax on to their customers and, therefore, they had not suffered an injury in fact. The Supreme Court rejected the argument and concluded that the wholesalers "plainly" had standing to challenge the tax. Id. In so concluding, the Court reasoned that the wholesalers had to pay the tax even if their customers did not furnish payment. Moreover, even if the tax were "completely and successfully" passed on, the Court found that the wholesalers were entitled

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protected by the statute or constitutional provision asserted as the basis for relief." von Kerssenbrock-Praschma v. Saunders, 48 F.3d 323, 325 n.1I (8th Cir.1995), citing Valley Forge Christian College v. Americans United for the Separation of Church & State, 454 U.S. 464, 474-75 (1982). Here, there is no dispute that Zenith/Kremer has asserted its own rights, and that its grievance is appropriately addressed to the Courts. Moreover, as a direct participant in the market for waste processing services, the Plaintiff clearly has "an interest in an interstate market free from discriminatory regulations," which is more than sufficient to pass the zone of interests test. Poor Richard's Inc. v. Ramsey County, Minn., 922 F.Supp. 1387, 1392 (D.Minn.1996).

to litigate whether the tax had an adverse competitive impact upon the conduct of their business. Id.

Here, Zenith/Kremer has presented evidence that, following the District's implementation of flow control, there have been significantly less expensive waste disposal alternatives that would otherwise have been available to it. Accordingly, we find no basis for distinguishing the holding in Bacchus Imports from the circumstances that have been presented here. See also, Ben Oehrleins & Sons v. Hennepin County, Minn., 867 F.Supp. 1430, 1434 (D.Minn.1994) ("It is well established that economic injury or the prospect of economic injury can satisfy the injury in fact requirement."). Therefore, finding that Zenith/Kremer has standing to mount the constitutional challenge it has, we proceed to determine if, as the District contends, the constitutional challenge has been waived.

2. Zenith/Kremer's Purported Waiver of its Right to Raise a Commerce Clause Challenge.

The District maintains that Zenith/Kremer has waived, or it should otherwise be estopped from asserting, a constitutional challenge to the District's exercise of flow control. Again, we disagree.

a. Standard of Review. Although a constitutional right may be waived, "to be effective, it must be a voluntary, intentional relinquishment or abandonment of a known right or privilege." Okeson v. Tolley School Dist. No. 25, 760 F.2d 864, 868 (8th Cir.1985), rev'd on other grounds, 766 F.2d 378 (8th Cir.1985), citing Brookhart v. Janis, 384 U.S. 1, 4 (1966). Indeed, "there is a presumption against the waiver of constitutional rights." Id. As the Supreme Court has explained, "a waiver of constitutional rights in any context must, at the very least, be clear." Fuentes v. Shevin, 407 U.S.

67, 95 (1972) [emphasis in original]. As a consequence, the Supreme Court has determined that a waiver must be established by "clear" and "compelling" evidence, Curtis Publishing Co. v. Butts, 388 U.S. 130, 145 (1967), and that Courts must "indulge every reasonable presumption against waiver of constitutional rights." Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

b. Legal Analysis. In attempting to establish a waiver, the District cites the conduct of several individuals who, in 1981--well after the complained of conduct--formed Zenith/Kremer, and who, on September 5, 1995, sold their business interests in Zenith/Kremer to its present owners. Affidavit of Kurt N.W. Soderberg, at 11 66; Affidavit of Scott Horner, at 1T 3. According to the District, this conduct was inconsistent with Zenith/Kremer's current claims and, therefore, the successors in interest to that conduct should be preclusively bound by its occurrence.

In this respect, the District asserts that, in January of 1974, when the District was seeking authority to designate solid waste disposal, the predecessors to Zenith/Kremer's current interests voiced concern that the District might assume the right to collect and to dispose of solid wastes, leaving them part owners of a landfill that would have no useful purpose and, resultantly, no revenues to finance its closure costs. Id. at 1T 28. Purportedly as a response to these concerns, the District redrafted a provision in its proposed legislative amendment, which would preclude it from entering the solid waste collection business.

As additional evidence of waiver, the District contends that, in 1975, these same individuals "participated in the decision making process that called for the construction of the District's RDF facility, and supported its construction and the

designation system." Defendant's Memorandum in Opposition, at p. 9. In support of this contention, the District notes that one of these individuals, Donald Judnick ("Judnick"), participated on an Advisory Committee which had recommended that the District adopt a system of designation. Affidavit of Kurt N. W. Soderberg, ll 42. According to the District, the Advisory Committee's minutes do not reflect any dissent by Judnick, to the Committee's recommendation. Id.[10]

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[10] As a close variant of its waiver argument, the District also claims that Zenith/Kremer should be estopped from raising a constitutional challenge because it has benefited from the processing of recyclable materials owing to the District's exercise of some form of paternal indulgence. As expressed by the District, the imposition of an onerous tipping fee encourages waste generators to recycle and, correlatively, has handsomely rewarded Zenith/ Kremer with income generated by the recycling of those wastes. In the District's view, having benefited from the District's regulatory efforts, Zenith/Kremer should now be estopped from challenging the validity of flow control. Defendant's Memorandum in Opposition, at pp. 21-22.

Not surprisingly, the District offers no legal authority for the result they would have us reach, as its argument has no merit. If, as the District now asserts, Zenith/Kremer unduly profits from an exaggerated tipping fee, which was imposed to elicit a change in the public's acceptance of recycling, then the obvious answer is that the District's premise for such a compulsory exaction was misguided. Absent from the District's argument is any showing that Zenith/Kremer accepted the asserted windfall, that purports to be caused by recycling, in exchange for acquiescence in the District's program of flow control. While the "windfall" may prove to be an offset to any damages that Zenith/Kremer may claim under Title 42 U.S.C. § 1983, we have no legally cognizable basis upon which to conclude that the same "windfall" bought Zenith/Kremer's constitutional silence.

Of course, the District's arguments of waiver and estoppel present a disquieting dark side, for they may be equally read as expressing the petulance of a participant in mutual back-scratching who is now confronted by a partner who is not merely reluctant to engage in its continuance, but who is fully prepared to blow the proverbial whistle.

We conclude that these factual allegations, viewed in a light most favorable to the District, do not evince a clear and intentional waiver, on Zenith/Kremer's part, of a constitutional right. As our Court of Appeals has explained, "[i]f proof of a waiver rests on one's acts, 'his [or her acts] * * * should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his [or her] conduct is possible." Okeson v. Tolley School Dist. No. 25, quoting Bechtel v. Liberty National Bank, 534 F.2d 1335, 1340 (9th Cir.1976). Neither logic, nor any compelling principle of law, would allow us to accept the District's postulate that the participation of certain waste haulers, in a waste planning process which occurred some six years before Zenith/Kremer's incorporation, evidences an intent by Zenith/Kremer to knowingly waive its constitutional rights.

With respect to events leading to the 1974 amendment to Chapter 458D, the evidence shows no more than that several independent waste haulers lobbied for protection from the District's confiscation, through legislative or regulatory means, of their waste collection business. We find no basis to transform that legitimate interest into a claimed waiver of Zenith/Kremer's right to compete in a market open to competitive forces of a freely operative interstate market.

In so concluding, we take some guidance from the Court's decision in Bonnolo Rubbish Removal, Inc. v. Town of Franklin, 886 F.Supp. 955, 962 (D.Mass.1995), a case that has been cited by the District. There, as here, a unit of local self-

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We have a great sense of unease that the paramount interests of the District's citizens have not always been in the forefront as the present power struggle has unfolded.

government argued that a plaintiff had waived any right to challenge the constitutionality of a flow control measure when the plaintiff agreed, in a permit to haul waste, to comply with the applicable local ordinance which required that all waste be deposited in a designated facility. In rejecting the government's waiver contention, the Court was persuaded by the fact that "the agreement made no mention of the possibility, or even hinted, that by signing it the permittee would waive its constitutional rights." Likewise, the District here has failed to present any evidence from which it may be reasonably inferred that Zenith/Kremer intended to unequivocally waive its rights under the dormant Commerce Clause.

Therefore, in concluding that Zenith/Kremer has standing to contest the District's flow control on Commerce Clause grounds, and further, that Zenith/ Kremer has not volitionally waived that right, we proceed to the merits of its constitutional challenge.

3. Zenith/Kremer's Commerce Clause Challenge to the District's Implementation of Flow Control.

In Count Two of its Complaint, Zenith/Kremer contends that the District's waste designation program impairs interstate commerce and, thereby, violates the Commerce Clause of the United States Constitution. In contrast, the District urges that genuine issues of material fact exist, which preclude the entry of Summary Judgment, particularly with respect to the purpose and effect of its designation of solid waste.

Alternatively, the District believes that, even if its implementation of flow control were properly categorized as discriminatory, the program serves legitimate local purposes which cannot be adequately served by available

nondiscriminatory alternatives and, therefore, the program should pass constitutional muster. We conclude, however, that the Record before us requires the entry of Judgment, as a matter of law, in Zenith/Kremer's favor.

a. Standard of Review. The Commerce Clause of the United States Constitution commands that "Congress shall have Power * * * [t]o regulate commerce * * * among the several states * * *." U.S. Const. Art. 1, § 8, cl. 3.[11] "Although the

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[11] Since the authority conferred by the Constitution is denominated as the power to "regulate," the dormant Commerce Clause is not applicable unless the State or local action can be characterized as "regulation." As a result, "the dormant Commerce Clause does not apply to states which are acting as 'market participants,' rather than as 'market regulators.'" Independent Charities of America, Inc. v. State of Minnesota, 82 F.3d 791, 798 (8th Cir.1996); see, also, Reeves, Inc. v. Stake, 447 U.S. 429, 434-37 (1980) (South Dakota could constitutionally confine the sale of cement, that was produced at a State-owned plant, to State residents, during the duration of a cement shortage, since the State, as a seller of cement, was exempt from the dormant Commerce Clause). The "market participant" exception to the Commerce Clause is premised upon the notion that, when a State enters the open market as a proprietor, as opposed to a regulator, there is considerably less danger that the State's activity will interfere with Congress's plenary power to regulate the marketplace. Id. at 799.

Here, the District makes no claim, and we find no basis in the Record to conclude, that the District's imposition of flow control was in its capacity as a "participant" in the local waste disposal economy. The designation scheme is not merely limited to the operation of the Incinerator but, rather, in requiring haulers to deliver collected waste to the Incinerator, the regulation controls the market activities of private market participants. As a consequence, the District's regulation does "not merely determine the manner or conditions under which the government will provide a service, [it] require[s] all participants in the market to purchase the government service--even when a better price can be obtained on the open market."

Atlantic Coast Demolition and Recycling, Inc. v. Bd. Of Chosen Freeholders, 48 F.3d 701, 717 (3rd Cir.1995); see also, SSC Corp. v.

Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." Independent Charities of America, Inc. v. State of Minnesota, 82 F.3d 791, 798 (8th Cir.1996), citing South-Central Timber Dev., Inc., Wunnicke, 467 U.S. 82, 87 (1984). As a consequence, the Commerce Clause has a "negative" or a "dormant" aspect which " denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., Inc. v. Dept. of Envtl. Qlty. of Oregon, --- U.S. ----, ----, 114 S.Ct. 1345, 1349 (1994).

It is now well-settled that solid waste, or at least the service involved in the processing and disposing of solid waste, is an article of commerce. C & A Carbone, Inc. v. Town of Clarkstown, --- U.S. ----, ----, 114 S.Ct. 1677, 1682 (1994) ("[T]he article of commerce is not so much the solid waste itself, but rather the processing and disposing of it."); see also, Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, 504 U.S. 353, 357 (1992) ("Solid waste, even if it has no value, is an article of commerce."); Poor Richard's, Inc. v. Ramsey County, Minn., supra at 1394- 95 (legislation which restricts movement of waste is subject to constitutional scrutiny). Accordingly, actions taken by political subdivisions, which tend to interfere with the free

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Town of Smithtown, 66 F.3d 502, 512 (2d Cir.1995) ("No private company in the open market could force others to buy its services under pain of criminal penalties. "), cert. denied, 116 S.Ct. 911 (1996). Therefore, we find that the market participant exception to the Commerce Clause does not apply and, accordingly, is unavailing to the District.

flow of waste, or of waste processing services, are exposed to scrutiny under the dormant Commerce Clause.[12]

In performing that scrutiny, "[t]he Supreme Court has established a two- step approach to the dormant commerce clause." SDDS, Inc. v. State of South Dakota, 47 F.3d 263, 267 (8th Cir.1995). The first step requires the Court to determine whether the State or local law "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce." Oregon Waste Sys., Inc. v. Dept. of Envtl. Qlty. of Oregon, supra at 1350, quoting Hughes v. Oklahoma, 441 U.S. 322, 336 (1979). In a Commerce Clause challenge, the plaintiff has

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[12] Of course, "Congress may authorize the States to engage in regulation that the Commerce Clause would otherwise forbid." Maine v. Taylor, 477 U.S. 131, 138 (1986). There is no suggestion, however, that Congress has authorized the waste designation regulation at issue here. While the District does not urge the point, we note that Justice O'Connor, in her concurring opinion to the judgment rendered in C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. ----, ----, 114 S.Ct. 1677, 1691 (1994), concluded that Congress's passage of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6941 et seq., did not, impliedly, authorize flow control. See also, Waste Systems Corp. v. County of Martin, Minn., supra. Moreover, notwithstanding the District's tangential invocation of the "Federal Water Pollution Control Act," no showing has been made that the Act grants the District authority to traverse the proscriptions of the Commerce Clause.

We would also note that, in May of 1995, the United States Senate passed the Interstate Transportation of Municipal Solid Waste Act of 1995, which would have authorized the designation that the District seeks to impose, but the measure was not approved by the House of Representatives. See, 142 Cong.Rec. S-1280-01. If, as the District avows, the societal advantages of flow control overshadow those of a free market economy, then the issue is properly before the legislative branch of the Federal Government, which can resolve the matter without doing violence to the Commerce Clause. Apparently, at least as of this date, Congress has not been so convinced.

the burden of demonstrating that the law discriminates on its face, or in its purpose or effect. Poor Richard's, Inc. v. Ramsey County, Minn., supra at 1395, citing Hughes v. Oklahoma, supra at 326. In this context, discrimination is "differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter." Id., quoting Oregon Waste Sys., Inc. v. Dept. of Envtl. Qlty. of Oregon, supra at 1350.

At the second step of the analysis, if "a state law is shown to discriminate against interstate commerce 'either on its face or in practical effect,' the burden falls on the State to demonstrate that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." Maine v. Taylor, 477 U.S. 131, 137 (1986), quoting Hughes v. Oklahoma, supra at 336. As recently expressed by the Supreme Court, such discrimination "is per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." C & A Carbone, Inc. v. Town of Clarkstown, supra at 1683. If the regulation does not discriminate, however, then it is subjected to a balancing test whereby the regulation will be upheld unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

b. Legal Analysis. Our analysis of the issues before us is closely guided, if not controlled, by the Supreme Court's recent holding in C & A Carbone, Inc. v. Town of Clarkstown, supra, where the Court entertained a challenge to flow control which closely mirrors that presented here. In Carbone, the local ordinance mandated that all qualified waste, that was generated within the Town of Clarkstown, had to be processed at a transfer facility that had been designated by the

Town government. Only after that designated facility had processed the waste, and had extracted a tipping fee from the hauler, could the waste be transported out of the Town limits.

In reviewing that ordinance in the prism of the Commerce Clause, the Court concluded that the ordinance discriminated against interstate commerce because it "hoard[ed] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility." Id. at 1683. In the Court's view, the ordinance was "just one more instance of local processing requirements" that are prohibited by the Commerce Clause. Id. at 1682-83 (citing cases involving statutes that required various articles of commerce to be processed within their State of origin). The Court reasoned that "[t]he essential vice in laws of this sort is that they bar the import of the processing service." In so concluding, it made no difference to the Court that both in-state and out-of-state transfer stations had been discriminated against in favor of a particular local facility, as the Court found that "this difference just ma[de] the protectionist effect of the ordinance more acute." Id. at 1683. Since the Court determined that the "practical effect and design" of the ordinance was discriminatory, the "heightened scrutiny" standard was applied, rather than the Pike balancing test. Id.

Under this "rigorous scrutiny" standard, the Court concluded that the Town had failed to demonstrate that it held no other means to advance a legitimate local interest. Id. at 1683. Notwithstanding much urging from the Town, the Court rejected its suggestion that, "as landfill space diminishes and environmental cleanup costs escalate," flow control was necessary in order to ensure the safe handling and proper treatment of solid waste. Id. As the Court reasoned, "[t]he teaching of our cases is that these arguments must be rejected absent the clearest showing that the unobstructed flow of

interstate commerce itself is unable to solve the local problem." Id. Under the circumstances presented there, the Court found that Clarkstown could enact uniform safety regulations which would prevent waste handlers from underpricing the free market by shortcircuiting environmental safety. Id. Similarly, the Court rejected the Town's assertion that flow control was essential to ensuring the long-term survival of the designated transfer facility. As the Court viewed the matter, general taxes or municipal bonds, as non-discriminatory alternatives to the implementation of flow control, could be employed by Clarkstown in subsidizing the transfer facility.

We find the reasoning and outcome in Carbone to be appropriate here. Notwithstanding the District's suggestion, that the Pike balancing test should be employed in our review of its designation program,[13] no cogent basis is offered to distinguish this case from the Supreme Court's holding in Carbone. While we agree with the District, that Carbone did not dictate a per se rule, which would subject all flow control measures to a strict scrutiny review, we are, nonetheless, required to apply the analytical approach, that was enunciated

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[13] In support of this contention, the District relies upon the Third Circuit's decision in Harvey & Harvey v. Chester, 68 F.3d 788 (3rd Cir.1995), cert. denied, --- U.S. ----, 116 S.Ct. 1265 (1996), as suggesting that a municipality might rebut a showing of discrimination if it could demonstrate that the regulation was promulgated by a neutral selection process. Id. at 801-03. According to the Court in Chester, "unless out-of-state businesses did not compete on an even playing field for the designation," a flow control ordinance might not violate the dormant Commerce Clause. Here, however, the District has not shown and, in fact, it cannot show, that out-of-state disposal facilities competed, on a level playing field, when the District designated its own facility as the sole solid waste processing center. Accordingly, even under the rule announced in Chester, the District' s designation would not pass the constitutional threshold.

in Carbone, in determining the intensity of the review that we must, ultimately, employ. Here, the regulation directs that all solid waste, which is located within the District, be processed at the District's Incinerator, or at a facility of the District's sole choice and, most notably, to the exclusion of both in-state and out-of-state competitors. Given the implacable prohibitions which are at play here--as they may be enforced through both criminal and civil sanctions--we are compelled to find, under the Carbone doctrine, that the District's waste designation program has pointedly discriminated against interstate commerce.

In reaching this conclusion, we note that the District's designation shares the vice that proved fatal in Carbone--namely, it "hoards" locally generated waste for the benefit of a preferred processing facility, thereby "squelching] competition in the wasteprocessing service altogether, leaving no room for investment from outside." Id. at 1683; see also, Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381, 1387 (8th Cir.1993) (finding waste ordinances discriminatory because " [t]hey, in practice, entirely forbid transport of waste out of the Counties"); Ben Oehrleins, Inc. v. Hennepin County, Minn., 922 F.Supp. 1396, 1402 (D.Minn.1996) ("Like the regulation in Carbone, the ordinance hoards the demand for waste processing (itself an article of commerce) for the benefit of the preferred facilities.") Therefore, irrespective of the purposes for which the designation was implemented, the design and effect of the ordinance is unmistakably discriminatory.[14] See, City of

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[14] Zenith/Kremer has presented evidence which has not been controverted and which reflects that, in the years of 1990, 1991 and 1992, it hauled solid waste to the District's Incinerator in volumes of 24,360 tons, 26,773 tons, and 26,904 tons, respectively. When these tonnages are multiplied by the applicable tipping rate per ton, fees were paid to the District, by Zenith/Kremer, in the estimated amounts of $1,120,600, $1,572,900, and

Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978) ("the evil of protectionism can reside in legislative means as well as legislative ends").

Having found that the District's imposition of flow control discriminates against interstate commerce, the burden then shifts to the District to "demonstrate, under rigorous scrutiny, that it has no other means to advance [its] legitimate local interest." C & A Carbone, Inc. v. Town of Clarkstown, supra at 1683. We find that the District has literally ignored this burden and, therefore, has failed to establish an essential element of its defense which warrants the imposition of Judgment against it, as a matter of law.

At its core, the District argues that it has a legitimate health and safety interest in maintaining an environmentally sound waste disposal system. With this proposition, we fully agree. See, e.g., Ben Oehrleins, Inc. v. Hennepin County, Minn., supra at 1403 ("There can be no dispute, in light of the solid waste disposal crisis which has given rise to much litigation nationwide, that environmentally sound waste disposal is a legitimate governmental objective."). Continuing, the District contends that its monopolistic control of solid waste serves a legitimate local interest because solid waste is consumed in the incineration of refuse sludge--a second form of societal waste.

$1,580,600, for each of the respective years. Given the fact that Zenith/Kremer is but one of the solid waste collectors that would have been impacted by the District's flow control, we cite these figures to give some dimension as to the burden--that is, the potential loss of revenues--that interstate commerce has sustained because of the District's designation policy. For obvious reasons, we cannot say that this burden is an incidental one, even when we discount these figures to allow for the reduced tipping fees that have been attributed to out-of-state landfill operators. See, e.g., Waste Systems Corp. v. County of Martin, Minn., supra at 1387.

While we have more than passing doubt as to the accuracy of the District's contention, that alternative methods for treating the sludge are environmentally inferior, we have no hesitation, under the regimen of Rule 56, in presuming its validity for the purposes of our review.[15]

To survive the test of strict scrutiny, the District must demonstrate that it has no other means, apart from flow control, to advance the local interest it has fostered through its imposition of waste designation The District, however, makes no such showing. Rather, it argues that the designation was established "in the mid-1970's to be assured of a source of fuel with which to incinerate sludge, not as a vehicle to finance the cost of a non-competitive incineration system." Defendant's Memorandum in Opposition, at p. 20. As support for this proposition, the District asserts that grant monies paid 90% of the initial costs incurred in the construction of the Incinerator. In the District's view, flow control, which is not solely intended as a financial measure, escapes the result reached in Carbone. We are not so persuaded.

To be sure, the Court in Carbone addressed the financial underpinnings of the ordinance at issue there but, even here, the District has admitted--albeit begrudgingly--that financial

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[15] In this respect, the District claims, in the most conclusory of tones, that the incineration of sludge is necessary as land application and landfilling have proved "unworkable." Affidavit of Kurt N.W. Soderberg, at b 46. The evidence before us, however, demonstrates that, for the first six and one-half years of the treatment facility's existence, the Incinerator was inoperable for all but about four months. We seriously doubt that the District or the local citizenry would accept, with nonchalance, such an extended and purportedly befouling disposal of refuse sludge, by means other than incineration. Nevertheless, under the rubric of Rule 56, Federal Rules of Civil Procedure, we accept the District's assertion as irrefutably true

interests are served by its adoption of flow control.[16] More importantly, we do not read Carbone as being limited to flow control ordinances that were enacted solely as a means to amortize the cost of a local disposal facility. The fatal defect in the ordinance at issue in Carbone was not that it was, in substance, a financing measure but, rather, that the ordinance eliminated competition in a waste processing service, notwithstanding the availability of nondiscriminatory alternatives. Indeed, the Court took pains to note that Clarkstown had pinioned its flow control, in part, upon local health and safety concerns that were, unquestionably, salutary. Nevertheless, the Court rejected those concerns as being superior to the Commerce Clause, as "Clarkstown ha[d] any number of nondiscriminatory alternatives for addressing the health and environmental problems alleged to justify the ordinance in question." Id. at 1683.

Nor are we persuaded that the District's contention, that "RDF was the only steadily available and usable fuel source for incineration," proves the constitutional validity of its waste designation program. Despite the District's urging, that this is one of the "narrow class of cases exemplified by Maine v.

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[16] In its responses to Zenith/Kremer's Requests for Admissions, the District responded to the following Requests as noted:

Request No. 15: Admit that [the District] has enforced and/or threatened to enforce Waste Designation in order to secure revenues to supports [sic] [the District's] capital and operational costs of its Incinerator.

Response: Deny that this is a complete statement of the reasons for [the District's] designation.

Request No. 16: Admit that [the District] has enforced and/or threatened to enforce Waste Designation as a financing measure for its waste management operations, including its Incinerator.

Response: Deny that this is a complete statement of the reasons for [the District's] designation.

Taylor, 477 U.S. 131 (1986)," see Defendant's Memorandum in Opposition, at p. 20, we are compelled to disagree. In Maine v. Taylor. supra, the Court upheld the State of Maine's ban on the importation of baitfish as the Court concluded that Maine had no other means of preventing a spread of parasites, and an adulteration of Maine's native fish populations. Id. Here, however, the District has failed to present any evidence that, since its implementation in 1978, flow control has been necessary to secure a source of fuel to incinerate refuse sludge. While we hear the District to argue that it designed itself into an engineering corner, the evidence does not support an absence of other viable fuel alternatives.[17] In fact, for substantial periods of time, including nearly the first seven years of the designation's existence, the Incinerator was not operational, and any flow control during those years served no conceivable fuel collection purpose. Moreover, the Record conf1rms that, when called upon to do so, the District has employed other fuel sources than solid waste--for example, wood chips, to name but one-- which the District has not characterized as either infeasible or otherwise imprudent. See, Affidavit of Timothy R. Thornton, Exhibit 16, Transcript of Hearing dated December 5, 1995.

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[17] To illustrate the abjectness of the District's failure of proof, we need only note that the District has neither alleged, nor has it proved, that 100 percent of all of the solid waste, which is generated in the District, is essential to the efficient operation of the Incinerator. Notwithstanding the fact that the District' s designation is both categorical and absolute, the District would have us surmise that anything less than a total commitment of all of the District's solid waste would be insufficient to allow the Incinerator to synergistically function. To defeat the entry of Judgment as a matter of law, some evidentiary showing, apart from mere speculation or surmise, is required. Cf., Sip-Top, Inc. v. Ekco Group, Inc., --- F.3d ----, 1996 WL 339835 (8th Cir.. June 21. 1996).

In like fashion, the District fares no better in arguing that the imposition of flow control is constitutional because garbage is less expensive, as a fuel source, than oil. See, Defendant's Memorandum in Opposition, at p. 3 ("The cost of fuel oil had increased dramatically."). Even accepting that contention as true, we are aware of no constitutional distinction between a regulation that is imposed for the purpose of subsidizing a facility's capital costs, and one that is implemented in order to subsidize that facility's operational costs. In either instance, the purpose in discriminating against interstate commerce is to ensure the long-term, economic viability of the facility--a purpose that has been squarely--and repeatedly--invalidated under the Commerce Clause. See, C & A Carbone, Inc. v. Town of Clarkstown, supra at 1684; Waste Systems Corp. v. County of Martin, supra at 1387-88; National Solid Waste Management Ass'n v. Williams, 877 F.Supp. 1367, 1375-76 (D.Minn.1995); Ben Oehrleins & Sons & Daughters v. Hennepin County, supra at 1433-34.

Next, the District argues that no other means exist by which to advance its "legitimate local health and environmental interests associated with the use of RDF as a sludge incineration fuel." Defendant's Memorandum in Opposition, at p. 20. As would appear obvious, in the District's view, its interest, for which it purportedly requires flow control, exceeds the mere incineration of sewage, and extends to the fuel utilized in that incineration process. While we are mindful that, in making this argument, the Defendant may be exalting the means employed in accomplishing an interest to the status of the interest itself, for purposes of this Motion, we will accept that the District has a legitimate interest in employing garbage to incinerate refuse sludge. Accordingly, we accept as true what the District requests a Trial to demonstrate-namely, that the integration of one solid waste to serve as the fuel to dispose of another waste results in a synergism that promotes worthy

environmental interests in ways that a separate treatment of both waste streams would not allow.

Nevertheless, the problem with this integration argument rests in its reliance on the incorrect, and unproven assumption, that flow control is the only means by which the synergism can be accomplished. As a matter of pure common sense, the District does not need flow control in order to secure a local supply of solid waste, as it need only lower its tipping fee so as to induce local haulers to dispose of their waste at the District' s facility. In effect, rather than to annihilate free and openly competitive trade, the District could have freely and openly embraced it. While a decrease in the tipping fee may have required the District to locate other sources for any lost revenues, such an anticipated loss is neither inevitable, nor is it of constitutional importance. As the Supreme Court has expressly recognized, it is well settled that "revenue generation is not a local interest that can justify discrimination against interstate commerce." C & A Carbone, Inc. v. Town of Clarkstown, supra at 1684. As the Record confirms, the District has recently identified three alternative means to finance a reduced tipping fee, inclusive of property taxes, ad valorem taxes, and service charges. Affidavit of Timothy R. Thornton, Exhibit 15, Solid Waste Service Charge Options, November 15, 1995. While such revenue sources may be politically unfavored, "[t]he [District] cannot rely * * * on a discriminatory regulation to compensate for its unwillingness to impose potentially less popular measures." Ben Oehrleins, Inc. v. Hennepin County, Minn., supra.[18] Therefore, since

[18] To the extent the District maintains that a lower tipping fee is unworkable since only the burning of locally generated waste produces the desired environmental benefit, the argument is unavailing, because it relies upon an unwarranted extension of the District's police powers. According to the District, it remains concerned that a lower tipping fee would promote the transportation of waste--a potential environmental

nondiscriminatory alternatives remain available to the District, quite apart from the implementation of flow control--or at least have not been shown to be unavailable, we conclude that the District has failed to carry its "heavy burden" of establishing a legitimate purpose, unrelated to the economic purpose of inexpensively securing locally generated solid waste, which cannot be advanced in a nondiscriminatory manner.[19] Accordingly, Zenith/Kremer is entitled to the entry of Summary Judgment, on its Commerce Clause claim, and we

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hazard--from outside of the District's boundaries, and would not, necessarily, restrict local collectors from transferring some waste to facilities outside of the District. See, Letter to Court dated June 5, 1996, at p. 4. However, "[s]tates and localities may not attach restrictions to exports or imports in order to control commerce in other states." C & A Carbone, Inc. v. Town of Clarkstown, supra at 1683. Thus, the District may not justify its use of flow control as a means of eliminating portended environmental hazards which, necessarily, occur outside of the District. See, Waste Systems Corp. v. County of Martin, Minn., supra at 1388 n. 13 ("[The] effects of landfilling in Iowa are not a legitimate concern for the Counties [in Minnesota].").

[19] We wish to make clear that our recommendation results from a total failure of proof, on the District's part, concerning an essential element of its burden to demonstrate that no alternatives to flow control have been available to it. See, e.g., Reagan v. Hi-Speed Checkweigher Co., Inc., 30 F.3d 947, 949 (8th Cir. 1994), citing Celotex Corp. v. Citrate, 477 U.S. 317, 323 (1986). While the District requests the opportunity to litigate various environmental and health claims, which it views as material to flow control, our Commerce Clause analysis, as it was enunciated in Carbone, is not concerned with the environmental superiority or inferiority of the District's use of solid waste as a fuel source. In like fashion, whether, as Zenith/ Kremer asserts, the incineration of refuse sludge adversely impacts the air quality of the District, in ways that are not implicated by landfilling practices, is an issue wholly extraneous to whether the District has contravened the Commerce Clause. Notwithstanding the District's labored effort to recast the issues before us in the mold of environmental, health and safety concerns, such a revamping has entirely missed the mark.

recommend that its Motion for Partial Summary Judgment be granted.

4. Section 1983 Liability.

In Count Three of its Complaint, Zenith/Kremer maintains that the District is liable for monetary damages, under Title 42 U.S.C. § 1983, that were caused by its unconstitutional exercise of flow control. In Dennis v. Higgins, 498 U.S. 439 (1991), the Supreme Court held that claims for damages, that are owing to a violation of the Commerce Clause, may be brought under Section 1983. Accord, Waste Systems Corp. v. County of Martin, Minn., supra at 1389. Having determined that the District's waste designation scheme violates the dormant Commerce Clause and, further, that Zenith/Kremer is not estopped from challenging that regulatory scheme, we conclude that Zenith/Kremer's claim is cognizable under Section 1983. Therefore, we further recommend that the Plaintiff's Motion for partial Summary Judgment, on its Section 1983 claim, be granted, with the amount of damages, if any, being subject to further proof. Moreover, as a prevailing party, we conclude that Zenith/Kremer is entitled to reimbursement for its reasonable attorneys' fees, pursuant to Title 42 U.S.C. § 1988, which can be determined at the time that any damage claim is litigated.

NOW, THEREFORE, It is-

RECOMMENDED:

That the Plaintiff's Motion for partial Summary Judgment [Docket No. 6] be granted.

NOTICE

Pursuant to Rule 6(a), Federal Rules of Civil Procedure, D.Minn. LR1. l(f), and D.Minn. LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties by no later than July 19, 1996, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing by no later than July 19, 1996, unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. § 636 to review the transcript in order to resolve all of the objections made.

MINNESOTA STATUTORY PROVISIONS

The relevant portions of the Minnesota Statutes cited in the Petition read as follows:

115A.554. AUTHORITY OF SANITARY DISTRICTS

Text of section effective until the effective date of rules adopted under § 115A.0716.

A sanitary district has the authorities and duties of counties within the district's boundary for purposes of sections 115A.0716; 115A.46, subdivisions 4 and 5; 115A.48; 115A.551; 115A.552; 115A.553; 115A.919; 115A.929; 115A.93; 115A.96, subdivision 6; 115A.961; 115A.991; 116.072; 375.18, subdivision 14; 400.08; 400.16; and 400.161.

* * *

400.08. SERVICE AREAS AND CHARGES

Subdivision 1. Definition. For purposes of this section, "solid waste management services" includes recycling and waste reduction services, collection, processing, and disposal of solid waste, closure and postclosure care of a solid waste facility, and response, as defined in section 115B.02, to releases from a solid waste facility or closed solid waste facility.

* * *

Subd. 3. Service charges. The county may establish by ordinance, revise when deemed advisable, and collect just and reasonable rates and charges for solid waste management

services provided by the county or by others under contract with the county. The ordinance may obligate the owners, lessees, or occupants of property, or any or all of them, to pay charges for solid waste management services to their properties, including properties owned, leased, or used by the state or a political subdivision of the state, the metropolitan airports commission established in section 473.603, the state agricultural society established in section 37.01, a local government unit, and any other political subdivision, and may obligate the user of any facility to pay a reasonable charge for the use of the facility. Rates and charges may take into account the character, kind, and quality of the service and of the solid waste, the method of disposition, the number of people served at each place of collection, and all other factors that enter into the cost of the service, including but not limited to depreciation and payment of principal and interest on money borrowed by the county for the acquisition or betterment of facilities. A notice of intention to enact an ordinance, published pursuant to section 375.51, subdivision 2, shall provide for a public hearing prior to the meeting at which the ordinance is to be considered.

WESTERN LAKE SUPERIOR

458D.01. PURPOSE AND POLICY

The legislature determines that in the lower St. Louis River basin area there are serious problems of water pollution and disposal of sewage and solid waste which cannot be effectively or economically dealt with by existing government units under existing laws. The legislature, therefore, declares that for the protection of the public health, safety and welfare of the area, for the preservation and best use of waters, land and other natural resources of the state in the area, for the prevention, control and abatement of water pollution and disposal of solid waste in the area, and for the efficient and economic collection, treatment and disposal of sewage and solid waste, it is necessary to establish in Minnesota for said area a sanitary board assigned the responsibility of carrying on a continuous long range program of planning with respect thereto and given the authority to take over, acquire, construct, better, administer, operate and maintain any and all interceptors and treatment works needed for the collection, treatment and disposal of sewage and solid waste in such area, as well as local sanitary sewer facilities over which the board agrees to assume responsibility at the request of any local government unit. The board may construct, operate and regulate solid waste disposal sites and facilities.

* * *

458D.03. SANITARY BOARD

Subdivision 1. Establishment. A sanitary board with jurisdiction in the Western Lake Superior Sanitary District is established as a public corporation and political subdivision of the state with perpetual succession and all the rights, powers,

privileges, immunities, and duties which may be validly granted to or imposed upon a municipal corporation, as provided in sections 458D.01 to 458D.24.

Subd. 2. Members and selection. The board shall be composed of nine members selected as follows:

(a) The mayor of the city of Duluth shall select four members and shall designate the term of each such member in accordance with subdivision 5, subject to the approval of the Duluth city council.

(b) The Cloquet city council by majority vote shall select three members and shall designate the term of each member in accordance with subdivision 5.

(c) The elected chief executives of all others municipalities in the district in the county of Carlton shall elect one member. The auditor of the county of Carlton shall, upon at least ten days' notice by mail, call a meeting of such chief executives, to be held at a suitable place in the district designated in the notice by the auditor. At the meeting, said chief executives shall elect the board member. A majority of the elected chief executives present in person or by their duly designated representatives shall constitute a quorum, but less than a majority may adjourn the meeting from time to time and compel the attendance of absent chief executives or their duly designated representatives. Each chief executive shall have one vote and an additional vote for each full 1,000 population in the municipality according to the latest census. The majority of the votes cast by the chief executives present and voting shall be required for election of the board member. Any chief executive may designate some other elected official of the same governing body of the municipality to attend the meeting in the chief executive's place and exercise the same

voting power to which the chief executive would be entitled if present.

(d) The elected chief executives of all other municipalities in the district in the county of St. Louis shall elect one member. The auditor of the county of St. Louis shall, upon at least ten days' notice by mail, call a meeting of such chief executives, to be held at a suitable place in the district designated in the notice by the auditor. At the meeting, such chief executives shall elect the board member. A majority of the elected chief executives present in person or by their duly designated representatives shall constitute a quorum, but less than a majority may adjourn the meeting from time to time and compel the attendance of absent chief executives or their duly designated representatives. Each chief executive shall have one vote and an additional vote for each full 1,000 population in the municipality according to the latest census. The majority of the votes cast by the chief executives present and voting shall be required for election of the board member. Any chief executive may designate some other elected official of the same governing body of the municipality to attend the meeting in the chief executive's place and exercise the same voting power to which the chief executive would be entitled if present.

* * *

458D.14. BONDS, CERTIFICATES AND OTHER OBLIGATIONS

Subd. 4. General obligation bonds. The board may by resolution authorize the issuance of general obligation bonds for the acquisition or betterment of any part of the district disposal system, including but without limitation the payment of interest during construction and for a reasonable period

thereafter and the establishment of reserves for bond payments and for working capital, or for the refunding of outstanding bonds, certificates of indebtedness, or judgments. The board shall pledge its full faith and credit and taxing powers for the payment of such bonds and provide for the issuance and sale and for the security of such bonds in the manner provided in chapter 475, and shall have the same powers and duties as a municipality issuing bonds under that law, except that no election shall be required and the debt limitations of chapter 475, shall not apply to such bonds. The board may also pledge for the payment of such bonds any revenues receivable under section 458D.11.

* * *

458D.15. TAX LEVIES

The board shall have power to levy taxes for debt service of the district disposal system, including solid waste disposal facilities, upon all taxable property within the district without limitation of rate or amount and without affecting the amount or rate of taxes which may be levied by the board for other purposes or by any local government unit in the district. No other provision of law relating to debt limit shall restrict or in any way limit the power of the board to issue the bonds and certificates authorized in section 458D.14. The board shall also have power to levy taxes as provided in sections 458D.11 and 458D.13. Each of the county auditors shall annually assess and extend upon the tax rolls of the auditor's county the portion of the taxes levied by the board in each year which is certified by the board. Each county treasurer shall collect and make settlement of such taxes with the treasurer of the board.

* * *

458D.17. MONEY, ACCOUNTS AND INVESTMENTS

Subdivision 1. Receipt and application. All money received by the board shall be deposited or invested by the treasurer and disposed of as the board may direct in accordance with its budget; provided that any money that has been pledged or dedicated by the board to the payment of obligations or interest thereon or expense incident thereto, or for any other specific purpose authorized by law, shall be paid by the treasurer into the fund to which they have been pledged.

Subd. 2. Funds and accounts. The board's treasurer shall establish such funds and accounts as may be necessary or convenient to handle the receipts and disbursements of the board in an orderly fashion.

Subd. 3. Deposit and investment. The money on hand in said funds and accounts may be deposited in the official depositories of the board or invested as hereinafter provided. The amount thereof not currently needed or required by law to be kept in cash on deposit may be invested in obligations authorized for the investment of municipal sinking funds by section 118A.04 Such money may also be held under certificates of deposit issued by an official depository of the board.

Subd. 4. Bond proceeds. The use of proceeds of all bonds issued by the board for the acquisition and betterment of the district disposal system, and the use, other than investment, of all money on hand in any sinking fund of funds of the board, shall be governed by the provisions of chapter 475, the provisions of sections 458D.01 to 458D.24 and the provisions of resolutions authorizing the issuance of such bonds. Such bond proceeds when received shall be transferred

to the treasurer of the board for safekeeping, investment and payment of the costs for which they were issued.

Subd. 5. Audit. The board shall provide for and pay the cost of an independent annual audit of its official books and records by the state public examiner or a certified public accountant.